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The Post 9-11 War on Terrorism ... What Does It Mean for the Attorney-Client Privilege

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COMMENT

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INTRODUCTION

In a swift response to the September 11, 2001, terrorist attacks, President Bush began vigorously exercising his executive powers.¹ This included not only the commitment of air, sea, and land forces in combat, but also several other measures focused on preventing further acts of terrorism

1. Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 CORNELL L. REV. 1233, 1234 (2002).

against the United States.² On October 26, 2001, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, commonly referred to as the USA Patriot Act.³ Following the passage of the USA Patriot Act, the Bush Administration exercised its executive power by issuing a number of rules and executive orders.⁴ On October 31, 2001, without notice or opportunity for comment, the Bush administration quietly ushered in the Bureau of Prisons rule allowing the government to listen in on conversations between an attorney and client in the federal prison setting.⁵

Although the constitutionality of this rule has not yet been challenged and a violation of the attorney-client privilege itself raises no constitutional issues, the Bureau of Prisons rule raises serious Sixth Amendment, Fifth Amendment and Fourth Amendment concerns.⁶ The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to counsel and implies an expectation of privacy in a defendant's communications with his or her attorney.⁷ The Fifth Amendment of the United States Constitution guarantees due process and protects a criminal defendant from compelled self-incrimination.⁸ The Fourth Amendment of the United States Constitution protects United States citizens from unreasonable searches and seizures.⁹ The specific issue of when the attorney-client privilege may be violated in the name of national security is yet to be addressed by the United States Supreme Court.¹⁰

2. See 18 U.S.C. § 3103a(b) (2002) (giving law enforcement and government leaders the right to conduct searches of homes and offices without prior notice); 50 U.S.C. § 1842 (2002) (using roving wire taps to listen in on telephone conversations); 18 U.S.C. § 2516(2) (2002) (monitoring computer and email messages); Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (establishing military tribunals for suspected terrorists). See also Cover, *supra* note 1; John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1101 (2002).

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of Titles 8, 18, 22, 28, 31, 42, 47, and 50 of the U.S. Code).

4. Cover, *supra* note 1, at 1234.

5. 28 C.F.R. § 501.3 (2003). See also Whitehead & Aden, *supra* note 2, at 1083.

6. United States v. Neill, 952 F. Supp. 834, 839-40 (D.D.C. 1997). See also Akhil Reed Amar & Vikram David Amar, *Symposium: The New Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why it Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163, 1164 (2002); Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, 17 CRIM. JUST. 22, 27 (2002).

7. U.S. CONST. amend. VI. See also DeMassa v. Nunez, 770 F.2d 1505, 1507 (9th Cir. 1985).

8. U.S. CONST. amend. V.

9. U.S. CONST. amend. IV. See also Whitehead & Aden, *supra* note 2, at 1101.

10. Rice & Saul, *supra* note 6, at 27.

Initially, the Background section of this comment will discuss the Bureau of Prisons rule promulgated in response to the September 11, 2001, terrorist attacks on the United States and the Department of Justice's rationale underlying the rule. In addition, the Background section of this comment will trace the development of the attorney-client privilege and the crime-fraud exception to this privilege. Section I of this comment's Analysis will then analyze the impact this rule will have on the attorney-client privilege and how the Department of Justice incorrectly utilized the crime-fraud exception to support its rule. Section II of this comment's Analysis will discuss the implications this rule presents with the Sixth, Fifth, and Fourth Amendments of the United States Constitution. Section III of this comment's Analysis will discuss the policy concerns the Bureau of Prisons rule raises, such as the vagueness of the rule and balancing civil liberties with national security. Finally, Section IV of this comment's Analysis will discuss other less intrusive means for monitoring attorney-client communications available to the government to prevent acts of terrorism.

BACKGROUND

I. The Bureau of Prisons Rule

The Bureau of Prisons rule allows the Attorney General to order the Director of the Bureau of Prisons to monitor or review communications between federal prison inmates and attorneys in order to deter future acts that could result in death or serious bodily injury to persons or substantial damage to property that would create the risk of death or serious bodily injury to persons.¹¹ The order may be issued any time that federal law enforcement

11. The Bureau of Prisons rule at issue in this comment is codified at 28 C.F.R. § 501.3(d). This rule states:

(d) In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section, provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

(1) The certification by the Attorney General under this paragraph (d) shall be in addition to any findings or determinations relating to the need for the imposition of other special administrative measures as provided in paragraph (a) of this section, but may be incorporated into the same document.

agencies have reasonable suspicion to believe that a certain inmate may use the communication for future acts of terrorism.¹² The regulation applies to all persons in custody under the authority of the Attorney General.¹³ This includes persons, even witnesses and detainees, held by Department of Justice agencies such as the Citizenship and Immigration Services.¹⁴ Under the Bureau of Prisons rule, an order to monitor communications does not require judicial approval.¹⁵ Further, the “Attorney General has complete authority to determine the procedures for” deciding which communications between an inmate and his or her attorney are protected by the attorney-client privilege.¹⁶

There are limits on the regulation. First, the Bureau of Prisons Director must “provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring” unless there is a court or-

(2) Except in the case of prior court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph (d). The notice shall explain:

- (i) That, notwithstanding the provisions of part 540 of this chapter or other rules, all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism;
- (ii) That communications between the inmate and attorneys or their agents are not protected by the attorney-client privilege if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

(3) The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring. To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material or conversations. Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

28 C.F.R. § 501.3(d).

12. *Id.* § 501.3(d); *see also* Cover, *supra* note 1, at 1235.

13. 28 C.F.R. § 501.3(d); *see also* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why it is Misguided)*, 48 VILL. L. REV. 469, 548-49 (2003).

14. Cole, *supra* note 13, at 549.

15. Cover, *supra* note 1, at 1235.

16. *Id.*

der.¹⁷ Second, the monitoring will be conducted by a “privilege team” made up of people who are not involved in prosecuting or investigating.¹⁸ Third, the “privilege team” may not disclose any information without approval from a federal judge except when the team determines that acts of violence or terrorism are imminent.¹⁹ And finally, any privileged materials acquired during the course of monitoring are not retained.²⁰ The purpose of these safeguards is to ensure that the acquired information is not abused by exposing privileged materials relating to an investigation or defense strategy.²¹

In spite of the safeguards built into the Bureau of Prisons rule, prominent leaders, lawyers and civil libertarians have criticized the rule.²² In response to this barrage of criticism, the executive branch defended the new rule and its quick implementation on several grounds.²³ First, the Department of Justice justified the issuance of the order for national security reasons, assuring the public that the interests of protecting American lives have been balanced with safeguarding civil liberties.²⁴ Second, the government asserted that the new rule is merely an application of the crime-fraud exception to the attorney-client privilege.²⁵ Finally, the Department of Justice emphasized that this new rule is simply an amendment to a pre-existing rule that was promulgated in 1996 under the Clinton administration.²⁶

The first justification for the rule was that immediate implementation was necessary for national security reasons. The Bureau of Prisons rule

17. 28 C.F.R. § 501.3(d)(2).

18. *Id.* § 501.3(d)(3).

19. *Id.*

20. *Id.* “Properly privileged” materials include, but are not limited to, recordings of privileged communications. *Id.*

21. *Id.*

22. Critics have claimed that the interception of attorney-client communications violates both the attorney-client privilege and rights guaranteed by the U.S. Constitution. In addition, others have criticized the rule as “an executive effort to exercise new powers without judicial scrutiny or statutory authorization.” Letter from Sen. Patrick Leahy, Chairman of the Senate Committee on the Judiciary, to John Ashcroft, Attorney General, U.S. Department of Justice (Nov. 9, 2001), available at <http://leahy.senate.gov/press/200111/110901.html> (last visited Dec. 1, 2003). See also *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Nadine Strossen, President, ACLU), available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=83 (last visited Dec. 1, 2003); Statement of Robert E. Hirshon, President, American Bar Association (Nov. 9, 2001), available at http://www.abanet.org/leadership/justice_department.html (last visited Dec. 1, 2003).

23. Cover, *supra* note 1, at 1235.

24. *Id.*

25. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,064 (Oct. 31, 2001) (codified in part at 28 C.F.R. § 501.3) (“[T]he law is clear that there is no protection for communications that are in furtherance of the client’s ongoing or contemplated illegal acts.”).

26. The rule promulgated under the Clinton administration allowed the Bureau of Prisons to impose special administrative measures on certain federal prison inmates. Ronald D. Rontunda, *Monitoring the Conversations of Prisoners*, 13 PROF. LAW. 1, 4 (2002); see *infra* notes 35-37 and accompanying text.

was quickly implemented without notice or opportunity for public comment.²⁷ Pursuant to the Administrative Procedure Act, the Department of Justice determined that there was good reason to publish the rule immediately and make it effective upon publication.²⁸ In light of the immediate threat to the United States' national security, according to the Justice Department, the delays inherent in the regular notice and comment process would have been "impracticable, unnecessary and contrary to the public interest."²⁹

The Department of Justice maintained that the terrorist acts of September 11, 2001, demonstrated a need for continuing vigilance in addressing terrorism and security-related concerns identified by the law enforcement and intelligence communities.³⁰ The Department of Justice further claimed that the rule was necessary "with respect to persons in its custody who may wrongfully disclose classified information that could pose a threat to national security or who may be planning or facilitating terrorist acts."³¹

27. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,065.

28. *Id.* The pertinent part of the Administrative Procedure Act is codified at 5 U.S.C. § 553(b)(B) & (d):

(b)(B) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—(1) a substantive rule which grants or recognizes an exemption or relieves a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause found and published with the rule.

29. Prevention of Acts of Violence and Terrorism, 66 Fed. at 55,065 (quoting 5 U.S.C. § 553(b)(B)).

30. *Id.* See also DOJ Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Sen. Comm. On the Judiciary*, 107th Cong. (2001) (testimony of Att'y Gen. John Ashcroft) ("We have the authority to monitor the conversations of 16 of the 158,000 federal inmates and their attorneys because we suspect that these communications are facilitating acts of terrorism."), available at http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42 (last visited Dec. 1, 2003).

31. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,065.

The second rationale offered in support of the Bureau of Prisons rule was that the rule was simply an application of the crime-fraud exception. When Attorney General Ashcroft announced the Bureau of Prisons rule to the public, he acknowledged that “the existing regulations . . . recognize the existence of the attorney-client privilege and an inmate’s right to counsel.”³² The Justice Department observed, however, that communications with an attorney that do not relate to seeking or providing legal advice are not covered by the privilege.³³ The Justice Department subsequently cited the crime-fraud exception to the privilege.³⁴

Third, the Attorney General defended the Bureau of Prisons rule by arguing that the new rule merely extends emergency regulations promulgated by President Clinton’s chief law enforcement officer, former Attorney General Janet Reno.³⁵ These regulations allow the Bureau of Prisons to impose “Special Administrative Measures” (SAMs) upon any federal prisoner when it finds “a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons”³⁶

32. *Id.* at 55,064. See also Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1243 (2003).

33. 28 C.F.R. §§ 500, 501; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064; see also Cohn, *supra* note 32, at 1243.

34. 28 C.F.R. §§ 500, 501; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,064; see also Cohn, *supra* note 32, at 1243.

35. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,062-66.

36. 28 C.F.R. § 501.3(a). Under the authority of § 501.3, SAMs are implemented “upon written notification to the Director, Bureau of Prisons, by the Attorney General’s discretion, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community.” *United States v. Reid*, 214 F. Supp. 2d 84, 86 (2002) (quoting 28 C.F.R. § 501.3(a)). The Attorney General’s power to impose SAMs is derived mostly from 5 U.S.C. § 301, “which grants the heads of executive departments the power to create regulations designed to assist them in fulfilling their official functions and those of their departments.” *Id.* at 86. In addition, 18 U.S.C. § 4001 vests control of federal prisons in the Attorney General and allows him to promulgate rules governing those prisons.

Typically, SAMs limit certain inmate privileges such as correspondence, visiting, interviews, and telephone use. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,063. See also Viet D. Dinh, *Freedom and Security After September 11*, 25 *HARV. J.L. & PUB. POL’Y* 399, 404 (2002). Under prior rules, regulations regarding special mail, visits, and telephone calls did not apply to communications between an inmate and his or her attorney. Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,063. Under the new rule, however, “in specific instances” the Bureau of Prisons may listen to attorney-client communications when it has “substantial reason” to believe that certain inmates who have been associated with terrorist activities “will pass messages through their attorneys (or the attorney’s legal assistant or an interpreter) to individuals on the outside for the purpose of continuing terrorist activities.” *Id.* at 55,063-64.

The new rule increases the amount of time that SAMs can be imposed from 120 days to one year, subject to additional one-year extensions. 28 C.F.R. § 501.3.

Where the head of an intelligence agency has certified to the Attorney General that there is a danger that the inmate will disclose classified information posing a threat to the national security, there is no logical reason to suppose that the threat to the national security will dissipate after

Those regulations, like the new Bureau of Prisons rule, are designed to isolate and limit the contact of especially dangerous inmates.³⁷

II. The Attorney-Client Privilege

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."³⁸ The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."³⁹ The privilege exists because certain communications are sacred and should be immune from coercion.⁴⁰ Because of their sacred nature, these communications should not be revealed.⁴¹ The underlying policy of the privilege is to promote free communications between a client and the attorney "in order to promote broader public interests in the observance of the law and administration of justice."⁴² The inherent trust created by the confidential nature of the attorney-client relationship and the subsequent protections this relation-

120 days. This rule allows the Director to designate a longer period of time, up to one year, in order to protect the national security.

Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,062.

The allowance for the additional time reflects an appropriate balancing of the interest of the individual inmates and of the public interest in protecting against the disclosure of such national security information. *Id.* at 55,063. Under the original rule providing for SAMs, the standard for approving extensions required a determination that "the circumstances identified in the original notification continue to exist." *Id.* The standard for approving such extensions under the new rule has been modified to require "only a determination that there is a continuing need for the imposition of special administrative measures in light of the circumstances." *Id.* The rule emphasizes that these changes serve to "more clearly focus the provisions for extensions—both the duration of time and the standards—on the continuing need for restrictions on a particular inmate's ability to communicate with others within or outside the detention facility in order to avoid the risks of terrorism and violence." *Id.*

37. Rotunda, *supra* note 26, at 4.

38. FED. R. EVID. 501.

39. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2290 (McNaughton rev. 1961)).

40. 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2292 (McNaughton rev. 1961).

41. *Id.* § 2290.

42. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). Academicians, judges and attorneys have articulated several policies underlying the attorney-client privilege. First, in a complex legal system the rights of an individual are jeopardized if expert legal advice is unavailable. WIGMORE, *supra* note 40, § 2291. Second, competent legal advice requires a complete understanding of the circumstances surrounding a client's needs and such an understanding may only be gained by encouraging complete disclosure within the attorney-client relationship. *Fisher v. United States*, 425 U.S. 391, 403 (1976). Third, if a client fears subsequent disclosure of communicated information in a court of law, then full disclosure is unlikely. *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457, 457-58 (1876). Finally, fully informed advice or advocacy in our adversarial system promotes the administration of justice. WIGMORE, *supra* note 40, § 2291.

ship enjoys are vital for facilitating the provision of legal services and ultimately the administration of justice.⁴³

In the United States, the attorney-client privilege has been defined and developed by two major influences—a treatise on evidence published by John Henry Wigmore shortly after the turn of the twentieth century and the United States Supreme Court.⁴⁴ Professor Wigmore stated that the general contours of the attorney-client privilege are as follows: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) *made in confidence* (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”⁴⁵

The second major influence on the attorney-client privilege was the United States Supreme Court. The Court’s treatment of the attorney-client privilege has reflected the concepts Wigmore put forth in his treatise.⁴⁶ For example, in an early Supreme Court case addressing attorney-client privilege, the Court described the policy behind the privilege: “If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.”⁴⁷ Subsequent Supreme Court cases support this conclusion and show the high regard the Court holds for the privilege.⁴⁸

An essential principle in the attorney-client relationship is confidentiality.⁴⁹ Therefore, without the client’s informed consent, a lawyer shall not reveal information relating to the representation of a client.⁵⁰ This policy promotes full and frank communication between a lawyer and a client.⁵¹ Further, the courts have acknowledged the importance of confidentiality by creating an evidentiary privilege.⁵² This privilege—the attorney-client privi-

43. *Upjohn*, 449 U.S. at 389.

44. *Cole*, *supra* note 13, at 474.

45. WIGMORE, *supra* note 40, § 2290 (emphasis added) (“The phrasing of the general principle so as to represent all its essentials, but only essentials, and to group them in natural sequence is a matter of some difficulty. The . . . form seems to accomplish this.”).

46. *Cole*, *supra* note 13, at 477.

47. *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876).

48. *See Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998); *United States v. Zolin*, 491 U.S. 554 (1989); *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *Hunt v. Blackburn*, 128 U.S. 464 (1888); *see also Cole*, *supra* note 13, at 479.

49. *See Schaefer*, 94 U.S. at 457-58.

50. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) cmt. 2 (2003).

51. *Id.*

52. The relationship between the parties and the circumstances under which the communication is made determines whether a “confidential communication” is “privileged.” Leslie A. Hagen & Kim Morden Rattet, *Communications and Violence Against Women: Michigan Law and Privilege, Confidentiality, and Mandatory Reporting*, 17 T. M. COOLEY L. REV. 183,

lege—recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.⁵³ The Supreme Court has held that "the lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."⁵⁴ This relationship is so crucial to the administration of justice that a lawyer's duty of confidentiality never ends.⁵⁵

For a statement to qualify as a privileged communication, it must originate in confidence, and confidence is essential to the continued vitality of the relationship.⁵⁶ Accordingly, the privilege does not attach when the party knowingly reveals the communication to a third party.⁵⁷ Such a disclosure destroys the confidentiality, and thus waives the privilege.⁵⁸

The attorney-client privilege is applicable only when the client communicates with the attorney for the purpose of obtaining legal advice or assistance.⁵⁹ Furthermore, application of the attorney-client privilege has been circumscribed by exceptions.⁶⁰ These exceptions reflect the understanding that, in certain circumstances, the privilege "ceases to operate" as a safeguard on the proper functioning of our adversary system.⁶¹

One such exception to the privilege has been labeled the crime-fraud exception. Model Rule of Professional Conduct 1.2(d) states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."⁶² An attorney-client communication can lose its privileged character when the communication was designed to further fraudulent or criminal ends.⁶³ The Supreme Court has stated that "the purpose of the crime-fraud exception to the attorney-client privilege [is] to assure that the 'seal of secrecy' . . . between lawyer and client does not extend to communications 'made for the purpose of getting ad-

192 (2000). Accordingly, testimonial privileges protect confidential communications that are made in the context of specific relationships by granting certain individuals the ability not to disclose information revealed to them in confidence. *Id.* Evidentiary privileges are legal rules, which govern the disclosure or admissibility of evidence in judicial proceedings or other legal proceedings. *Id.* Confidentiality is based on ethical standards of professions such as physicians, attorneys, psychotherapists, and other professionals. *Id.*

53. Trammel v. United States, 445 U.S. 40, 51 (1980).

54. *Id.*; see also Fisher v. United States, 425 U.S. 391 (1976).

55. Swidler & Berlin v. U.S., 524 U.S. 399, 403.

56. WIGMORE, *supra* note 40, § 2285.

57. *Id.* § 2336.

58. *Id.*

59. *Id.* § 2292.

60. See Clark v. U.S., 289 U.S. 1, 15 (1933).

61. Swidler & Berlin v. U.S., 524 U.S. 399, 414 (quoting U.S. v. Zolin, 491 U.S. 554, 562-63 (1989)).

62. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

63. Clark, 289 U.S. at 14 (1933); see also U.S. v. Zolin, 491 U.S. 554, 562-63 (1989).

vice for the commission of a fraud' or a crime."⁶⁴ As a policy matter, the law will not assist a client who abuses the attorney-client privilege.⁶⁵ Accordingly, communications designed to further acts of violence or terrorism will not be protected.

The proper application of the crime-fraud exception is unsettled.⁶⁶ The burden of proof required to overcome the attorney-client privilege under the crime-fraud exception has not been resolved, and the evidentiary burden for obtaining in camera review for a judge to determine when the crime-fraud exception applies is equally unresolved.⁶⁷ Courts have not even agreed on the process that should be followed in evaluating the evidence.⁶⁸

The Supreme Court first addressed the crime-fraud exception to privileges in *Clark v. United States*.⁶⁹ Although the Court's discussion of the attorney-client privilege is dictum, *Clark* is frequently cited for its articulation of the crime-fraud exception to the attorney-client privilege.⁷⁰

In *Clark*, the defendant, Genevieve A. Clark, served on a jury in a federal criminal trial and cast the only vote for acquittal.⁷¹ During voir dire, Clark stated to several women on the jury panel that she wished to serve on the jury, and that she was afraid her former employment by the criminal defendant, Foshay, would disqualify her.⁷² Clark was ultimately selected to serve as a juror, and during the first week of Foshay's trial, Clark made several remarks about Foshay to her fellow jurors, which were not supported by the evidence.⁷³ Clark was subsequently charged with obstruction of justice for intentionally concealing her former employment with the defendant, and for falsely stating that she was free from bias during voir dire.⁷⁴ The trial court found Clark guilty and sentenced her to prison.⁷⁵ On appeal to the United States Supreme Court, Clark argued that the admission at her crimi-

64. *Zolin*, 491 U.S. at 563 (quoting *O'Rourke v. Darbhshire*, 1920 A.C. 581 (H.L. 1920) (Eng.)).

65. Rice & Saul, *supra* note 6, at 22.

66. Christopher Paul Galanek, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1124 (1990).

67. *Zolin*, 491 U.S. at 563 ("The quantum of proof needed to establish admissibility . . . remains [] subject to question.").

68. Cole, *supra* note 13, at 503.

69. *Clark v. U.S.*, 289 U.S. 1, 14 (1933).

70. Geraldine Gauthier, *Dangerous Liaisons: Attorney-Client Privilege, the Crime-Fraud Exception, ABA Model Rule 1.6 and Post-September 11 Counter-Terrorist Measures*, 68 BROOKLYN L. REV. 351, 354 (citing *United States v. Zolin*, 491 U.S. 554, 556 (1989); *In re Selsler*, 105 A.2d 395, 399-400 (N.J. 1954); RESTATEMENT (THIRD) OF LAW GOVERNING LAW: CLIENT CRIME OR FRAUD § 82 cmt. B (1998)).

71. *Clark*, 289 U.S. at 15.

72. *Id.* at 7.

73. *Id.*

74. *Id.* at 9.

75. *Id.* at 10.

nal contempt trial of her fellow juror's testimony regarding her conduct during deliberations violated the privilege attached to jury deliberations and votes.⁷⁶ The Court found an analogy between "a privilege which protects from impertinent exposure the arguments and ballots of a juror" and the attorney-client privilege.⁷⁷ The Supreme Court found that the other juror's testimony regarding matters that took place in the jury room could not be shielded by any privilege because Clark used fraudulent means to become a juror.⁷⁸ The Court likened the situation to one in which the crime-fraud exception applies.⁷⁹ However, the Court went on to say that when one tries "to drive the [attorney-client] privilege away, there must be 'something to give colour to the charge;' there must be 'prima facie evidence that it has some foundation in fact.'"⁸⁰ Mere allegations of crime or fraud are insufficient to except a communication from the attorney-client privilege.⁸¹ While *Clark* made it clear that a party challenging the attorney-client privilege bears the burden of proving that the crime-fraud exception applies, the decision failed to establish a clear standard for establishing that burden of proof.⁸²

More recently, the Supreme Court addressed the crime-fraud exception in *United States v. Zolin*.⁸³ In connection with a tax investigation of L. Ron Hubbard, founder of the Church of Scientology (the Church), the Internal Revenue Service (IRS) brought an action to compel a state court clerk, Frank Zolin, to produce sealed documents and tape recordings.⁸⁴ The Church and Hubbard's wife intervened.⁸⁵ The United States District Court for the Central District of California ordered production of some of the documents, but none of the tapes.⁸⁶ All parties appealed to the Court of Appeals for the Ninth Circuit.⁸⁷ The IRS contended that the district court erred in rejecting the application of the crime-fraud exception to the tapes.⁸⁸ In particular, the IRS argued that the district court incorrectly held that the IRS had abandoned its request for in camera review of the tapes, and that the court should have listened to the tapes before ruling that the crime-fraud

76. *Id.* at 12-14.

77. *Id.* at 13-14.

78. *Id.*

79. *Id.* at 14 ("[T]he privilege does not apply where the relation giving birth to it has been fraudulently begun or continued.").

80. *Id.* at 15 (quoting *O'Rourke v. Darbshire*, 1920 A.C. 581 (H.L. 1920) (Eng.)).

81. *Id.* at 14; *see also* *Neuder v. Battelle*, 194 F.R.D. 289, 298 (D.D.C. 2000); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *In re Richard Roe*, 68 F.3d 38 (2d Cir. 1995); *Ward v. Succession of Freeman*, 854 F.2d 780, 790 (5th Cir. 1988); *Coleman v. American Broad. Co.*, 106 F.R.D. 201, 203 (D.C. Cir. 1985); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir. 1939)).

82. Gauthier, *supra* note 70, at 355.

83. *U.S. v. Zolin*, 491 U.S. 554 (1989).

84. *Id.* at 554.

85. *Id.*

86. *Id.*

87. *Id.* at 560.

88. *Id.*

exception was inapplicable.⁸⁹ The Court of Appeals affirmed the district court's holding that the crime-fraud exception was inapplicable, and the IRS appealed to the United States Supreme Court.⁹⁰

The *Zolin* Court declined to address the evidentiary showing required to defeat the attorney-client privilege.⁹¹ Although, the Court in *Zolin* acknowledged that the Court's use of the term *prima facie case* to describe the showing needed to defeat the attorney-client privilege on the basis of the crime-fraud exception in *Clark* had created great confusion, it failed to resolve the inconsistency.⁹² The Court noted that

[t]he *prima facie* standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege altogether *without* affording the client an opportunity to rebut the *prima facie* showing.⁹³

While the *Zolin* Court acknowledged the confusion created by the *Clark* decision, the Court did not resolve the issue.

Instead, the *Zolin* Court focused on the evidentiary showing necessary to obtain in camera judicial review of the privileged communications at issue so that a court can make the determination of whether or not the exception applies.⁹⁴ Ultimately, the *Zolin* Court held that when a party seeks to introduce privileged communications into evidence at trial, courts have discretion to hold an in camera hearing to determine if the crime-fraud exception applies.⁹⁵ The party seeking to invoke the crime-fraud exception "must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability."⁹⁶ Thus, *Zolin* does not endorse a blanket rule permitting judges to conduct in camera reviews when deciding the crime-fraud exception's applicability.⁹⁷ The Court noted that such a blanket rule would inhibit "open and legitimate disclosure between attorneys and clients" and might violate the client's due

89. *Id.*

90. *Id.*

91. *Id.* at 563 ("[W]e need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception.").

92. *Id.* at 565 n.7.

93. *Id.* at 565 (emphasis in original).

94. *Id.* at 563-65.

95. *Id.* at 556-57, 569 (stating that in camera review does not destroy attorney-client privilege).

96. *Id.* at 574-75 (emphasis added).

97. *Id.*

process rights.⁹⁸ The Court, however, did not establish how much evidence is needed to obtain in camera review.⁹⁹

Consequently, the *Zolin* decision did little to lend predictability to what evidence may or may not be considered a showing of crime or fraud sufficient to overcome the attorney-client privilege or to obtain in camera review.¹⁰⁰ Hence, the lower courts were left to develop their own standards.¹⁰¹ The results have been inconsistent and confusing.¹⁰² Some courts have applied *Zolin* to develop a test for overcoming the attorney-client privilege.¹⁰³ Other courts have interpreted *Zolin* as a test for merely obtaining in camera review for privileged materials.¹⁰⁴

98. *Id.* at 571.

99. The Court merely set a standard that the party opposing the attorney-client privilege "must present evidence sufficient to support a *reasonable belief* that in camera review *may* yield evidence that establishes the exception's applicability." *Id.* at 574. *See supra* note 96 and accompanying text.

100. Gauthier, *supra* note 70, at 359.

101. *Id.* at 358.

102. Most courts apply a two-pronged test: (1) the party challenging the privilege must make a *prima facie* showing that the client was involved in or was planning criminal behavior when he sought legal advice, or that the client committed the crime or fraud after receiving counsel's advice; and (2) the challenger must provide proof that the client obtained legal advice in order to further criminal or fraudulent activity. Amber Harding et al., *Procedural Issues*, 39 AM. CRIM. L. REV. 923, 965 (2002) (citing *In re Federal Grand Jury Proceedings*, 938 F.2d 1578, 1581 (11th Cir. 1991); *Charles Woods Television Corp. v. Capitol Cities/ABC, Inc.*, 169 F.2d 1155, 1161-62 (8th Cir. 1989); *U.S. v. Laurins*, 857 F.2d 529, 540 (9th Cir. 1988); *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986)).

103. For example, the Second Circuit requires "that a party seeking to overcome the attorney-client privilege with the crime-fraud exception must show that there is 'probable cause to believe that a crime or fraud ha[s] been committed and that the communications were in furtherance thereof.'" *In re Doe v. United States*, 13 F.3d 633, 637 (2d Cir. 1994) (quoting *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1024, 1031 (2d Cir. 1984)). The Fifth Circuit held that "a party must present evidence of an intent to deceive to establish a *prima facie* case of fraud or perjury." *Industrial Clearinghouse, Inc. v. Browning Mfg. Div. Of Emerson Elec. Co.*, 953 F.2d 1004, 1008 (5th Cir. 1992) (in camera review was not at issue in this case).

104. For example, the D.C. Circuit held that the burden to obtain in camera review would be satisfied by evidence, which, "if believed by the trier of fact would establish elements of" ongoing or imminent crime or fraud. *In re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1998). The Seventh Circuit requires a discovering party to have a plausible, supportable theory of crime or fraud before the privileged communications can be subject to review. *United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993). The Ninth Circuit requires moving parties to show a relationship between the attorney-client communications and the crime or fraud, and that the communications were in furtherance of the crime or fraud in order to obtain in camera review. *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996). In the Tenth Circuit, to receive in camera review, a crime-fraud challenge to the attorney-client privilege requires a *prima facie* showing that "attorney participation in crime or fraud has some foundation in fact." *Motley v. Marathon Oil*, 71 F.3d 1547, 1551 (10th Cir. 1995).

The most important concept to take from *Zolin* is that, even to obtain in camera review of privileged materials, the party challenging the attorney-client privilege on the basis of the crime-fraud exception must present more than a reasonable suspicion that the crime-fraud exception applies.¹⁰⁵ *Zolin* also held that simply obtaining in camera review does not overcome the attorney-client privilege; therefore, even if in camera review is held, the party challenging the attorney-client privilege must establish a prima facie showing of crime or fraud in order to overcome the privilege.¹⁰⁶

ANALYSIS

I. The Bureau of Prisons Rule has a Significant Impact on Attorney-Client Privilege

The Bureau of Prisons rule requires that, in the absence of prior judicial approval, an inmate must be fully informed about the possibility that a federal agent from the Justice Department can listen to and record the conversations between the inmate and his or her attorney.¹⁰⁷ However, whether or not the conversation is actually overheard or recorded, the client will likely believe that the conversation is being overheard or recorded, and that fact alone will change the nature of the conversation.

The Bureau of Prisons rule has a significant impact on the trust that is the hallmark of the client-lawyer relationship. "Clients consult attorneys for a wide variety of reasons, many of which involve confidences that are not admissions of crimes, but nonetheless are matters the clients would not wish divulged."¹⁰⁸ A client may not know whether information he discloses to his attorney will later be relevant to a civil or criminal matter or whether it will be of substantial importance.¹⁰⁹ Moreover, in order to competently represent their clients, attorneys will be forced to advise their clients not to disclose anything.¹¹⁰ Not only that, but, the Bureau of Prisons rule threatens to

105. U.S. v. *Zolin*, 491 U.S. 554, 574-75 (1989). See *supra* note 96 and accompanying text.

106. *Zolin*, 491 U.S. at 574-75. See *supra* note 95-96 and accompanying text. *Zolin* gives courts discretion to hold in camera review. *Zolin* 491 U.S. at 556-57, 569. It follows that even if a judge refuses to hold in camera review, a prima facie showing of crime or fraud may overcome the privilege.

107. 28 C.F.R. § 501.3(d).

108. *Swidler & Berlin v. U.S.*, 524 U.S. 399, 407 (1998).

109. *Upjohn Co. v. U.S.*, 449 U.S. 383, 392 (1981).

110. *Cover*, *supra* note 1, at 1256. Since the client will not know what information will be relevant or of substantial importance, the safest advice the attorney can give his client is not to disclose anything, because federal agents may overhear anything the client says. In addition, if a client decides to communicate with his attorney in the presence and hearing of a third person, the communication is not confidential and is not entitled to the protection afforded by the attorney-client privilege. Michael G. Walsh, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R.4TH 594, § 2 [a] (1982). Thus, under this general rule of waiver, when a third person is made privy to a

limit the valuable efforts of the attorney to ensure the client's compliance with the law.¹¹¹

Accordingly, the new Bureau of Prisons rule has provoked widespread criticism in spite of the government's good intentions to protect its citizens from future terrorist attacks.¹¹² Underestimating the policy interests served by the attorney-client privilege and limiting judicial review of government intrusion into that privilege is not the course of action that the Justice Department should follow.¹¹³ Due to the long-recognized sacred nature of the attorney-client privilege, the Bureau of Prisons rule is the most intrusive government action taken against the attorney-client privilege.¹¹⁴

After the United States Supreme Court decision in *Zolin*, the lower courts struggled to find a consistent standard for determining what constitutes a prima facie showing of crime or fraud.¹¹⁵ However, no matter what standard is used to determine when the crime-fraud exception applies, it is important to note that a safeguard is in place to ensure that the crime-fraud exception does not overtake the rule—a judge decides whether the attorney-client privilege attaches to a communication or not.

The Department of Justice defends the Bureau of Prisons rule on the ground that the crime-fraud exception should apply.¹¹⁶ To support its claim of the crime-fraud exception's applicability, the Department of Justice cites *Clark* and a number of circuit court decisions.¹¹⁷ All of the cases cited by the Department of Justice vary from the Bureau of Prisons rule in one very significant respect—none of those cases support applying the crime-fraud exception without prior judicial review.¹¹⁸ The Department of Justice ignores the judicial review aspect of the cases it cited in support of the Bureau of Prisons rule.

The Bureau of Prisons rule bypasses the requirement of a prima facie showing of crime or fraud.¹¹⁹ The rule does not implement procedures by

communication between an attorney and client, that third person is competent to testify as to the communication. *Id.* See *supra* notes 56-58 and accompanying text.

111. *Upjohn Co. v. U.S.*, 449 U.S. 383, 392 (1981). It is the attorney's obligation to inform the client of the legal consequences of his actions and offer advice or guidance on how to best stay within the boundaries of the laws. See *infra* notes 401-05 and accompanying text.

112. *Cole*, *supra* note 13, at 554.

113. *Id.*

114. See *supra* notes 38-54 and accompanying text.

115. *Gauthier*, *supra* note 70, at 355. See *supra* notes 100-106 and accompanying text.

116. *Cover*, *supra* note 1, at 1239 (citing Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,064 (Oct. 31, 2001) (codified at 28 C.F.R. pts. 500 & 501)).

117. *Id.*

118. *Id.*

119. Judicial review is only available if the privilege team decides to *disclose* the privileged information. 28 C.F.R. § 501.3(d)(3). The rule allows federal agents to breach the confidential nature of attorney-client communications, and thus undermines the attorney-

which a judge could review whether the privilege should attach and whether sufficient evidence permits an exception.¹²⁰ Rather, the Bureau of Prisons rule gives the Department of Justice unlimited discretion to eavesdrop on confidential conversations of persons in custody, and such discretion is subject neither to judicial oversight nor meaningful standards.¹²¹ Thus, the Bureau of Prisons rule permits law enforcement officials, with limited judicial safeguards, to determine whether to vitiate the protections of the attorney-client privilege.¹²² Such a scheme sidesteps the judicial involvement presumed in *Clark* and the other cases cited by the Justice Department.¹²³

Zolin's standard of "reasonable belief" of crime or fraud for merely obtaining a court's in camera review of evidence supporting the crime-fraud exception may be comparable to the Bureau of Prisons rule's "reasonable suspicion" standard.¹²⁴ However, the Bureau of Prisons rule imposes that standard for eavesdropping on attorney-client communications and essentially presumes that the crime-fraud exception attaches.¹²⁵ By using the term "reasonable belief," the Court in *Zolin* demonstrated the intent for an objective standard to apply to the initial determination of whether a legitimate crime-fraud exception challenge to the privilege is being advanced.¹²⁶ An objective standard limits the discretion of individual judges and screens out weak and spurious challenges to the privilege.¹²⁷ Contrarily, the Bureau of Prisons rule allows eavesdropping without prior judicial review to determine whether the suspicion is in fact "reasonable."¹²⁸ In light of *Zolin's* denial of

client privilege, by eavesdropping. Furthermore, the Bureau of Prisons rule does not provide a judicial mechanism to determine whether it is appropriate to listen to the conversations in the first place.

120. Cohn, *supra* note 32, at 1233.

121. *Id.*

122. Cover, *supra* note 1, at 1240. In application, the Bureau of Prisons rule allows the Justice Department to unilaterally decide when the crime-fraud exception applies and when the attorney-client privilege is to be vitiated. See generally 28 C.F.R. § 501.3(d). In addition, the crime-fraud exception applicability can only be determined after the attorney-client communications are actually made. The Bureau of Prisons rule is premised on the assumption that the crime-fraud exception will be applicable since the attorney-client communications have not actually been made.

123. Cover, *supra* note 1, at 1240.

124. *Id.* at 1241.

125. *Id.* The Justice Department listens to the conversation first and then decides whether the communication is privileged. 28 C.F.R. § 501.3(d). This is contrary to the standard established in *Zolin* that the party challenging the privilege present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes that the crime-fraud exception applies. *U.S. v. Zolin*, 491 U.S. 554, 574-75 (1989). See *supra* notes 96-99 and accompanying text.

126. Cole, *supra* note 13, at 495.

127. *Id.*

128. Cohn, *supra* note 32, at 1233. The rule requires no review—judicial or otherwise—before a federal agent is allowed to listen in on attorney-client communications. 28 C.F.R. § 501.3. Whether the federal agent's suspicion of acts of terrorism is "reasonable" is a matter of the federal agent's discretion. *Id.* § 501.3(d). The rule's provision for judicial review occurs only after the attorney-client communications have been overheard. *Id.* § 501.3(d)(3).

automatic in camera review and the objective standard that the Court established for determining whether the crime-fraud exception applies, it is doubtful that the Attorney General's unilateral review is acceptable.¹²⁹

In effect, the Bureau of Prisons rule "allows the fox to guard the henhouse."¹³⁰ Neither the Attorney General nor the Director of the Bureau of Prisons is a judge or magistrate.¹³¹ In matters where the Attorney General believes national security is at risk, the Department of Justice is not detached, disinterested, and neutral as a court or magistrate must be.¹³² "Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws."¹³³ The Attorney General and the Department of Justice are properly biased parties, cast in the role of adversary, in national security cases.¹³⁴ Consequently, piercing the attorney-client privilege should be reserved to judges and magistrates, not prosecutors or prison officials.¹³⁵

In theory, the privilege team is supposed to be the equivalent of a neutral magistrate.¹³⁶ However, the rule does not specify who will make up the privilege teams.¹³⁷ Without guidelines as to the composition of the privilege teams it is impossible to tell if the privilege teams will actually be detached, disinterested, and neutral.¹³⁸ In application, it is probable that the privilege teams will be composed of prosecutors and investigators.¹³⁹

II. The Bureau of Prisons Rule Raises Serious Constitutional Concerns

Although the attorney-client privilege is a cornerstone of the adversarial system, the Supreme Court has never held it to be constitutionally guaranteed; therefore, a violation of the attorney-client privilege, in itself, raises no constitutional issues.¹⁴⁰ In its rationale for the Bureau of Prisons rule, the government asserts that the privilege itself is based in policy, rather than in the Constitution, and therefore it "cannot stand in the face of coun-

129. Cohn, *supra* note 32, at 1233.

130. Cover, *supra* note 1, at 1241.

131. Katz v. United States, 389 U.S. 347, 359 (1967) (Douglas, J., concurring).

132. *Id.*

133. *Id.*

134. *Id.*

135. Cohn, *supra* note 32, at 1239 (citing U.S. v. Zolin, 491 U.S. 554 (1989)).

136. See *infra* notes 345-65 and accompanying text.

137. See 28 C.F.R. § 501.3. See also *infra* notes 345-65 and accompanying text.

138. See *infra* notes 345-65 and accompanying text.

139. The only limitation on the privilege team composition is that members are not involved in the underlying investigation or prosecution. 28 C.F.R. § 501.3(d)(3).

140. Rice & Saul, *supra* note 6, at 25. However, denying the privilege may raise Sixth Amendment issues. See *infra* notes 142-198 and accompanying text.

tervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose."¹⁴¹ Though infringing on the attorney-client privilege is not a per se constitutional violation, such infringement is a factor when determining whether a client's Sixth, Fifth, and Fourth Amendment rights were violated.

A. The Bureau of Prisons Rule Presents Sixth Amendment Implications

The Sixth Amendment and the attorney-client privilege are very much intertwined.¹⁴² The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, the accused shall enjoy the right to counsel.¹⁴³ The right to counsel embodied in the Sixth Amendment plays a crucial role in the adversarial system, because access to counsel's skills and knowledge is necessary to provide defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.¹⁴⁴ This guarantee gives a client the right to communicate with his or her attorney through the investigation, preparation of the case, and the trial itself.¹⁴⁵ Like the attorney-client privilege, the Sixth Amendment's guarantee of the right to counsel ensures the rights to private communications with an attorney and fairness in the administration of the case.¹⁴⁶ The privilege recognizes that lawyers need all relevant information to represent clients effectively and to advise clients to refrain from wrongful conduct.¹⁴⁷ Such advocacy depends upon the client fully informing the lawyer.¹⁴⁸

Although the attorney-client privilege has never explicitly been held to be constitutionally guaranteed, denying the privilege raises a compelling argument that a defendant has been denied his Sixth Amendment right to effective assistance of counsel.¹⁴⁹ Denying the privilege may impair the attorney's ability to offer effective assistance to a client. Consequently, in some cases, a restriction on the attorney-client privilege may violate the Sixth Amendment.¹⁵⁰ In order to assert a valid claim under the Sixth Amendment, an accused must establish a violation of the privilege *and* show

141. U.S. v. Goldberger & Dubin, 935 F.2d 501, 504 (2d Cir. 1991).

142. Cover, *supra* note 1, at 1247.

143. U.S. CONST. amend. VI.

144. Strickland v. Washington, 466 U.S. 668, 692 (1984). See also Adams v. U.S., ex rel., McCann, 317 U.S. 269, 275, 276; Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

145. Maine v. Molton, 474 U.S. 159 (1985).

146. Cohn, *supra* note 32, at 1233.

147. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2.

148. *Id.*

149. Cohn, *supra* note 32, at 1239.

150. Rice & Saul, *supra* note 6, at 25.

that the violation affected the attorney's ability to render effective representation in order to assert a valid claim under the Sixth Amendment.¹⁵¹

The leading United States Supreme Court case discussing whether monitoring attorney-client communications is a Sixth Amendment violation is *Weatherford v. Bursey*.¹⁵² Before *Weatherford's* decision, a majority of courts expressed the view that governmental eavesdropping on attorney inmate communications violated the defendant's Sixth Amendment right to counsel, regardless of whether the defendant was prejudiced by the governmental action.¹⁵³

In *Weatherford*, the defendant, Brett Allen Bursey, and an undercover agent, Jack M. Weatherford, were arrested for vandalizing a county selective service office.¹⁵⁴ The undercover agent met with both the defendant and his counsel at trial planning sessions on two separate occasions in order to maintain his masquerade and avoid suspicion.¹⁵⁵ On the morning of Bursey's trial, the prosecution called Weatherford as a witness because he had been seen in the company of police officers and had lost his effectiveness as an undercover agent.¹⁵⁶ The jury convicted Bursey.¹⁵⁷ After he served his sentence, Bursey sued Weatherford alleging that Weatherford's participation in the two meetings with Bursey and his counsel deprived Bursey of the effective assistance of counsel.¹⁵⁸ The district court ruled for Weatherford but the court of appeals reversed concluding that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial" and that the "concealment of petitioner's undercover status lulled respondent into a false sense of security, interfering with his trial preparations and denying him due process of law."¹⁵⁹

The Supreme Court reversed the court of appeals' decision and specifically declined to adopt any *per se* rule that would hold that the government's monitoring of a criminal defendant's conversations with his lawyer is a violation of the Sixth Amendment.¹⁶⁰ The Court in *Weatherford* held that

151. *Weatherford v. Bursey*, 429 U.S. 545, 557-58 (1977).

152. 429 U.S. 545 (1977).

153. See *Coplon v. U.S.*, 191 F.2d 749, 759 (D.C. Cir. 1951); *Caldwell v. U.S.*, 205 F.2d 879, 881 (D.C. Cir. 1953); *U.S. v. Gartner*, 518 F.2d 633, 637 (2d Cir. 1975); *U.S. v. Ostrer*, 422 F.Supp. 93, 99 (S.D.N.Y. 1976); *U.S. v. Zarzour*, 432 F.2d 1, 3 (5th Cir. 1970); *U.S. v. Brown*, 484 F.2d 418, 424 (5th Cir. 1973); *South Dakota v. Long*, 465 F.2d 65, 72 (8th Cir. 1972).

154. *Weatherford*, 429 U.S. at 547-48.

155. *Id.*

156. *Id.*

157. *Id.* at 549.

158. *Id.*

159. *Id.*

160. *Id.* at 551.

there was no violation of the Sixth Amendment right to counsel where no evidence in the case originated from the informer's attending the conference, there was no communication of defense strategy to the prosecution by the informer, and there was no purposeful intrusion into the attorney-client relationship by the informer.¹⁶¹ The Court rejected the view that any governmental eavesdropping on attorney-client communications violates the Sixth Amendment.¹⁶² The Court did acknowledge, however, that the presence of a government informant during conversations between an inmate and his or her attorney, in a different circumstance, *may* impair a defendant's Sixth Amendment right to counsel.¹⁶³ The Court observed that the fear that some third party might turn out to be a government agent would inhibit attorney-client communication to a lesser degree than the fear that the government was monitoring the communication through electronic eavesdropping.¹⁶⁴ The Court relied on several factors to determine whether a Sixth Amendment violation had occurred including: (1) whether the monitor's identity had been revealed; (2) the purpose of the monitoring; (3) whether the information was revealed to prosecutors; and (4) whether the defendant could show actual prejudice in the preparation of or in the actual trial.¹⁶⁵ The Court focused on prejudice to the defendant by the prosecution's improper use of information from the monitored conversations. The Court stated, "with respect to the right of counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial."¹⁶⁶

In its summary of the Bureau of Prisons rule, the Justice Department cites *Weatherford v. Bursey* for the proposition that "the presence of a government informant during conversations between a defendant and his or her attorney *may, but need not, impair* the defendant's Sixth Amendment right to effective assistance of counsel."¹⁶⁷ However, the facts in *Weatherford* are significantly different from and the *Weatherford* holding does not justify what the Attorney General has instituted for inmates already in custody under the Bureau of Prisons rule.¹⁶⁸ The defendant in *Weatherford* did not know in advance that he was being monitored so his conversations were not "chilled."¹⁶⁹ Under the Bureau of Prisons rule, however, if the monitoring team warns the prisoner that it may be listening in on attorney-client conversations, there is a "chill" on free communication between the attorney and

161. *Id.*

162. *Id.*

163. Cover, *supra* note 1, at 1246.

164. *Weatherford v. Bursey*, 429 U.S. 545, 551 (1977).

165. *Id.* See also Rotunda, *supra* note 26, at 5.

166. *Weatherford*, 429 U.S. at 552.

167. 28 C.F.R. §§ 500, 501 (emphasis added).

168. Rotunda, *supra* note 26, at 6.

169. *Weatherford v. Bursey*, 429 U.S. 545, 547-48 (1977). "Chill" means to inhibit or discourage. BLACK'S LAW DICTIONARY 233 (7th ed. 1999).

the client.¹⁷⁰ The *Weatherford* Court observed that government interception of attorney-client confidences could result "in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard."¹⁷¹ In that case, however, the Court minimized the significance of the inhibition of free exchange between the defendant and counsel because there was no reason for the lawyer and the defendant Bursey to have had such a fear and been so inhibited.¹⁷² Under the Bureau of Prisons rule, however, a lawyer and a defendant have every reason to fear being overheard; in fact, they are told they *may* be listened to.¹⁷³

The ambiguity of the Supreme Court's opinion in *Weatherford v. Bursey* resulted in a split between the circuits over what intrusion does, in fact, violate the Sixth Amendment.¹⁷⁴ For example, the *Weatherford* Court found no Sixth Amendment violation, despite finding a privilege violation, because there was no prejudice to the defendant.¹⁷⁵ Cases since *Weatherford* have articulated a variety of views regarding the conditions under which governmental eavesdropping on attorney-client communications violates the Sixth Amendment right to counsel.¹⁷⁶ There is authority that the right to counsel is violated, regardless of whether the accused suffered prejudice, if attorney-client confidences were actually disclosed to the government enforcement agencies in charge of investigating and prosecuting the defendant's case.¹⁷⁷ Other courts have expressed that governmental monitoring of a criminal defendant's conversations with his attorney violates the defen-

170. Rotunda, *supra* note 26, at 6.

171. *Weatherford*, 429 U.S. at 545, 555.

172. Cover, *supra* note 1, at 1248.

173. *Id.* at 1252.

174. *Id.* at 1246. Further complicating the uncertain state of the law is the fact that government intrusions can take on many forms which often have very different fact patterns. Therefore, it is even more difficult to establish one rule. Cover, *supra* note 1, at 1258 n.95. For example, government intrusions may include informants, wiretapping, or electronic surveillance. *Id.* In addition, the intrusions may occur in a home, a prison, an office, and may or may not involve attorney-client communication. *Id.*

175. Cover, *supra* note 1, at 1248.

176. Robin C. Miller, Annotation, *Propriety of Governmental Eavesdropping on Communications Between Accused and His Attorney*, 44 A.L.R. 4TH 841 § 2 (1986). Among the factors that courts have considered to determine if a Sixth Amendment right to counsel violation has occurred are: Whether the governmental misconduct was egregious; whether the communication related to the defendant's trial; whether the government obtained the evidence as a result of the eavesdropping; whether defense strategy was communicated to the government through the eavesdropping; whether the defendant suffered prejudice as a result of the eavesdropping; whether the eavesdropping was purposeful; whether the defendant had been aware that a third party was eavesdropping; and the nature of the surveillance (i.e., electronic or aural). *Id.*

177. *Id.* §§ 2, 5. See also *United States v. Curcio*, 608 F. Supp. 1346, 1356 (D.C. Conn. 1985). This view parallels the *Weatherford* dissent: "[T]he Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding." *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (Marshall, J., dissenting).

dant's Sixth Amendment right to counsel *only if* the substance of the overheard conversation was of some benefit to law enforcement officials.¹⁷⁸ Still other authority supports the view that governmental eavesdropping on communications between a criminal defendant and his attorney violates the defendant's Sixth Amendment right to counsel *only if* the eavesdropping prejudiced the defendant.¹⁷⁹

In a very recent case, *United States v. Abdel Sattar*, the defendant, Ahmed Abdel Sattar, was indicted on charges of conspiring to provide and providing material support and resources to foreign terrorist organizations.¹⁸⁰ Prior to trial, Sattar moved to compel the government to disclose whether his attorney-client communications at the Metropolitan Correctional Center in New York where he was being held, were the target of any electronic surveillance pursuant to 28 C.F.R. § 501.3(d) without prior notification.¹⁸¹ Sattar argued that he could not effectively communicate with his counsel due to his fear that the government might intercept privileged communications and use them against him in his criminal proceedings without any finding of probable cause that his attorney-client communications were being used to further ongoing terrorist or criminal activity.¹⁸² Sattar's co-defendants, Mohammed Yousry and Lynne Stewart, joined Sattar's motion on the basis that the government's refusal to assure them that their attorney-client conversations were not being monitored made it impossible for them to meet and discuss joint strategies or to enter into a joint defense agreement.¹⁸³

The government in the *Sattar* case refused to provide any assurances that it was not engaging in surveillance because to do so would "disclose information concerning the status or existence of ongoing criminal investigations and/or foreign intelligence operations, if any, which would thereby undermine the investigations."¹⁸⁴ At the trial, the district court held that the possibility of judicially authorized electronic surveillance did not deprive the defendant of the right to effective assistance of counsel.¹⁸⁵ The court ruled that there could be no violation of the Sixth Amendment without a showing that the communication was used against the defendant, thereby prejudicing the defense.¹⁸⁶

178. Miller, *supra* note 176, § 5. See *Mastrian v. McManus*, 554 F.2d 813, 821 (8th Cir. 1977).

179. Miller, *supra* note 176, § 5. See also *Pobliner v. Fogg*, 438 F.Supp 890, 892 (S.D.N.Y. 1977); *State v. Martinez*, 643 P.2d 555, 559 (1982).

180. *U.S. v. Sattar*, 2002 WL 1836755, *1 (S.D.N.Y. 2002).

181. *Id.*

182. *Id.* at *3.

183. *Id.* at *4.

184. *Id.* at *2.

185. *Id.* at *6.

186. *Id.*

The Court has recognized that the Sixth Amendment right to counsel also entails the right to the *effective* assistance of counsel.¹⁸⁷ While a showing of ineffective assistance of counsel generally requires demonstrating prejudice, the Supreme Court has also held that the government violates a defendant's right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.¹⁸⁸ The Court has stated, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."¹⁸⁹ Accordingly, in some cases, a showing of prejudice is not required. Therefore, counsel can deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance."¹⁹⁰

Weatherford remains a widely cited case, perhaps because it is subject to a wide variety of interpretations.¹⁹¹ The rule established in *Weatherford* does not answer enough questions regarding the attorney-client privilege in the prison context.¹⁹² If we accept the *Weatherford* Court's holding to apply to all attorney-client situations, as the *Sattar* court did, then we are giving the government freedom to take liberties as long as there is no prejudice to the defendant. The question then becomes: Does the Bureau of Prisons rule violate the Sixth Amendment if there is no prejudice to the defendant? Under *Weatherford*, the answer would be "no" as long as the privilege team works as an effective screen between the monitor and the prosecution.¹⁹³ However, the Court has also held that a showing of prejudice is not required when the government interferes with a defendant's right to effective counsel.¹⁹⁴ In theory, the privilege team *could* prevent prejudice. However, in reality, relying on privileges teams to prevent prejudice requires a leap of faith for the defendant—the defendant must accept that his communication will be protected by the Justice Department's privilege team in order to fully exercise his Sixth Amendment right to counsel.¹⁹⁵ Consequently, the defendant will be prejudiced because the defendant will not fully exercise his Sixth amendment right to counsel. The defendant that is not able to confide in his attorney will not get the defense he is guaranteed by the Sixth Amendment.¹⁹⁶ The Bureau of Prisons notice of monitoring will chill attorney-client communication.¹⁹⁷ Thus, an essential prerequisite for effective

187. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *See also* *McMann v. Richardson*, 397 U.S. 759, 771 & n. 14 (1970).

188. *See Strickland v. Washington*, 466 U.S. 686 (1984).

189. *Glasser v. United States*, 315 U.S. 60, 76 (1942).

190. *Id.*

191. *Miller*, *supra* note 176, § 2. *See supra* notes 174-179 and accompanying text.

192. *See supra* notes 174-179 and accompanying text.

193. *Rotunda*, *supra* note 26, at 6.

194. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

195. *See infra* notes 216-19 and accompanying text.

196. *See Strickland*, 466 U.S. at 692.

197. *See supra* notes 170-73 and accompanying text.

representation, "full and frank disclosure" between an attorney and client, will be precluded.¹⁹⁸

B. In Application, the Bureau of Prisons Rule May Present Fifth Amendment Implications

Government intrusion into communications protected by the attorney-client privilege may deprive an inmate of his Fifth Amendment rights.¹⁹⁹ This analysis is closely tied to the Sixth Amendment right to effective assistance of counsel and many of the principles underlying Fifth and Sixth Amendment jurisprudence overlap.²⁰⁰ Therefore, this analysis will not reiterate Sixth Amendment concerns but will alert the reader to the potential Fifth Amendment implications that the Bureau of Prisons rule presents.

1. The Bureau of Prisons Rule May Violate the Due Process Clause

The Fifth Amendment to the United States Constitution guarantees the right to fundamental fairness and due process of law.²⁰¹ Due process protected by the Fifth Amendment includes the right of one accused of a crime to have the effective and substantial aid of counsel.²⁰² This includes the right to consult privately with an attorney both before and during the trial.²⁰³

In some cases, courts have relied on the Fifth Amendment Due Process Clause and have held that eavesdropping by state or federal government agents on a criminal defendant's attorney-client communications at the defendant's jail violated the Fifth Amendment.²⁰⁴ However, the threshold for finding and remedying such a violation under current case law is very high.²⁰⁵

198. See *supra* note 42 and accompanying text.

199. Paul R. Rice, *Fifth Amendment Right to Due Process*, in ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 10:5 (2003).

200. *Coplon v. United States*, 191 F.2d 749, 759 (D.C. Cir. 1951). See Rice, *supra* note 199, § 10:5.

201. U.S. CONST. amend. V. The Fifth Amendment provides that a person cannot be compelled to engage in self-incrimination in a criminal matter or deprived of life, liberty, or property without due process of law. *Id.*

202. Miller, *supra* note 176, § 5.

203. *Id.*

204. See *Coplon*, 191 F.2d at 757; *Caldwell v. U.S.*, 205 F.2d 879, 881 (D.C. Cir. 1953). These early cases unequivocally establish the principle that it is both the Fifth and Sixth Amendments that guarantee to persons accused of a crime the right to privately consult with counsel both before and during trial. *Coplon*, 191 F.2d at 759. "This is a fundamental right which cannot be abridged, interfered with, or impinged upon in any manner." *Id.*

205. Rice, *supra* note 199, § 10:5.

Several more recent cases hold that to be a constitutional violation, the law enforcement technique must be so outrageous that it is fundamentally unfair and "shocking to the universal sense of justice mandated by the Due Process Clause of the Fifth Amendment."²⁰⁶ In *United States v. Russell*, the Supreme Court recognized outrageous governmental conduct as a legal defense.²⁰⁷ The *Russell* Court said that whether outrageous governmental conduct exists "turns upon the totality of the circumstances with no single factor controlling" and the defense can only be invoked in the rarest and most outrageous circumstances.²⁰⁸ This defense only calls into question whether the government can use the information recovered by law enforcement at trial, not whether it should have been obtained in the first place.

In *United States v. Ofshe*, the defendant, Ronald Arthur Ofshe, was arrested for possession with intent to distribute cocaine.²⁰⁹ The government placed a body bug on Ofshe's attorney and monitored Ofshe's conversations with his attorney in connection with the government's investigation.²¹⁰ After entering a conditional guilty plea, Ofshe was convicted.²¹¹ On appeal to the Eleventh Circuit, Ofshe argued that the government's conduct in violating his attorney-client privilege was so outrageous that it violated his Fifth Amendment due process rights.²¹² The Eleventh Circuit Court of Appeals concluded that the invasion of the attorney-client privilege produced no evidence against Ofshe and, therefore, Ofshe's defense was not prejudiced.²¹³ The court said, "In determining whether such [prejudicial] conduct exists, the 'totality of the circumstances' must be considered 'with no single factor controlling.'"²¹⁴ The Eleventh Circuit Court of Appeals, after considering the totality of the circumstances, held that the government's actions were not so outrageous as "to shock the universal sense of justice" and the motion to dismiss Ofshe's indictment was dismissed.²¹⁵ Both *Ofshe* and other cases addressing government intrusion into the attorney-client privilege illustrate that without extreme circumstances, the courts will not find a violation of the Fifth Amendment Due Process Clause.

206. *U.S. v. Russell*, 411 U.S. 423, 432 (1973); *U.S. v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir. 1984); *U.S. v. Tobias*, 662 F.2d 381, 387 (5th Cir. 1981); *U.S. v. Mulherin*, 710 F.2d 731, 735 (11th Cir. 1983).

207. *Russell*, 411 U.S. at 432.

208. *Tobias*, 662 F.2d at 387 (citing *Russell*, 411 U.S. at 431-32).

209. *United States v. Ofshe*, 817 F.2d 1508, 1510 (11th Cir. 1987).

210. *Id.* at 1516.

211. *Id.* at 1508.

212. *Id.* at 1516.

213. *Id.*

214. *Id.* (quoting *U.S. v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir. 1984)).

215. *Id.*

The Bureau of Prisons rule provides for privilege teams, presumably, in order to cure Fifth Amendment Due Process problems.²¹⁶ In theory, the privilege teams will work as screens to ensure that the acquired information is not abused and the inmate will not be prejudiced by any information obtained by the monitoring.²¹⁷ The question becomes: How effective is the screening used in the monitoring regulations? Can the "privilege teams" be trusted to keep the communications private? Further, can the government effectively establish such a "Chinese wall?"

[R]eliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable and should be discouraged. The appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe that any such Chinese wall would be impenetrable²¹⁸

Only the most trusting prisoner will be amenable to discussing defense strategy candidly with his lawyer if he knows that agents from the organization that is trying to convict him are listening.²¹⁹

In reality, if a monitored inmate exercises his right to counsel, any statement he offers to his attorney will be a statement to federal agents.²²⁰ A necessary part of due process is the client's ability to speak to his attorney frankly and candidly.²²¹ The inmate is not likely to be forthcoming if the attorney tells the inmate, "Go ahead, tell me everything. The government

216. Christine M. Gentile, *Balancing Security v. Liberty: The Attorney-Client Privilege in the Age of Terrorism*, 6 N.Y. CITY L. REV. 87, 107 (2003).

217. 28 C.F.R. § 501.3(d)(3).

218. *U.S. v. Stewart*, 2002 WL 1300059, *8 (S.D.N.Y. 2002) (quoting *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994)). This is a legitimate concern because the government has been accused of unlawfully disclosing protected information in the past.

Although its proceedings have always been shrouded in secrecy, the FISA court overturned a wiretap order in May 2002, publishing an unprecedented rebuke of the Department of Justice, whom it accused of misleading the court to justify electronic surveillance in more than 75 investigations. The court criticized the DOJ for unlawfully permitting intelligence information to be shared with criminal investigators, stating it had made "erroneous statements" in applications for wiretap orders about "the separation of the overlapping intelligence and criminal investigators and the unauthorized sharing of FISA information with FBI criminal investigators and assistant U.S. attorneys."

Cohn, *supra* note 32, at n.93.

219. Cole, *supra* note 13, at 51.

220. Under the Bureau of Prisons rule, the inmate's attorney can effectively become an interrogator for the government if he probes the inmate for pertinent information.

221. *Coplon v. U.S.*, 191 F.2d 749, 759 (D.C. Cir. 1951).

can and may listen to this conversation, but they cannot use that information against you in court.” Furthermore, what will the government do when it does intercept a true threat of terrorism from the inmate? It is difficult to believe that the inmate’s statements will not find their way into a courtroom. This situation is arguably so outrageous as “to shock the universal sense of justice.”

2. The Bureau of Prisons Rule May Violate an Inmate’s Right Against Self-Incrimination

The attorney-client privilege also helps preserve the right against self-incrimination enumerated in the Fifth Amendment.²²² Early American jurisprudence viewed the attorney-client privilege as an extension of the Fifth Amendment privilege against self-incrimination.²²³ Early legal scholars viewed the attorney-client privilege as necessary to preserve a criminal defendant’s Fifth Amendment rights.²²⁴ They argued that, without the attorney-client privilege, the defendant would forgo communicating with his attorney in order to preserve his right against self-incrimination.²²⁵ Accordingly, the attorney-client privilege was the only way to safeguard a defendant’s right against self-incrimination and preserve his right to effective assistance of counsel.²²⁶

Additionally, courts have held that the electronic monitoring by jail authorities of a criminal defendant’s conversations with his attorney violates the defendant’s Fifth Amendment privilege against compelled self-incrimination.²²⁷ “The spectacle of the state spying on attorney-client communications of persons placed in its custody offends even the least refined notions of fundamental fairness and due process of law, and . . . we find it reprehensible.”²²⁸ Monitoring the sacred communications between an attorney and inmate subjects the accused to having confidential information conveyed to, and possibly utilized by, an unfriendly adversary.²²⁹ Of even greater constitutional importance, it defeats the potential Sixth Amendment right to consult privately with counsel.²³⁰ Such monitoring also gives the

222. Norman K. Thompson & Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F.L. REV. 1, 37 (2000).

223. See *Rochester City Bank v. Suydam Sage & Company*, 5 How. Pr. 254, 258-59 (N.Y. Sup. Ct. 1851); *Coplon*, 191 F.2d at 757 (D.C. Cir. 1951) (stating that the due process protected by the Fifth Amendment includes the right of one accused of a crime to have the effective and substantial aid of counsel).

224. Harvard Law Review Association, Notes, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977).

225. *Id.*

226. *Id.*

227. See *Fajeriak v. State*, 520 P.2d 795, 799 (Alaska 1974); *People v. Holman*, 356 N.Y.S.2d 958, 961 (N.Y. 1974).

228. *Fajeriak*, 520 P.2d at 799.

229. *Id.*

230. See *supra* notes 142-151 and accompanying text.

state an “opportunity to circumvent the defendant’s [F]ifth [A]mendment privilege against self-incrimination.”²³¹ “The devastating impact of exposure of confidential information to the prosecution similarly impinges on the right to effective assistance of counsel in defending against criminal charges.”²³² Thus, the Bureau of Prisons rule is an example of government spying on attorney-client communications.

C. The Bureau of Prisons Rule Presents Fourth Amendment Implications

Much of the commentary surrounding the Bureau of Prisons rule discusses the Sixth Amendment. However, the rule also has Fourth Amendment implications. While the Sixth Amendment protects the attorney-client privilege in the context of criminal prosecution, the Fourth Amendment protects privacy more broadly.²³³

The Fourth Amendment guarantees an American citizen’s right to privacy by prohibiting “unreasonable searches and seizures.”²³⁴ The Supreme Court has frequently expressed that the purpose of the Fourth Amendment is to “prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”²³⁵ The Court has also reiterated that, to function properly, the Fourth Amendment prefers that a “neutral and detached” judge decide when a search or seizure is appropriate.²³⁶

The extent to which Fourth Amendment’s protections should be extended to prison inmates remains unsettled.²³⁷ While the Court has held that “[a prison inmate’s] rights may be diminished by the needs and exigencies of the institutional environment,” the Court has also recognized that “a prisoner

231. *Fajeriak*, 520 P.2d at 800.

232. *Id.*

233. *Amar & Amar*, *supra* note 6, at 1164.

234. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

235. *Whitehead & Aden*, *supra* note 2, at 1101 (citing *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *U.S. v. Ortiz*, 422 U.S. 891, 895 (1975); *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)).

236. *Id.* However, it is important to note that the Court has upheld many warrantless searches because they were reasonable. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). *See infra* notes 308-10 and accompanying text.

237. *See Lanza v. New York*, 370 U.S. 139 (1962).

is not wholly stripped of constitutional protections when he is imprisoned for crime."²³⁸ "There is no iron curtain drawn between the Constitution and the prisons of this country."²³⁹

Accordingly, courts have generally held that prison inmates are entitled to limited Fourth Amendment protection.²⁴⁰ The limitations on a prison inmate's Fourth Amendment protection have been based on two theories: Prisons are not constitutionally protected areas and prisoners do not have a reasonable expectation of privacy.²⁴¹

The Supreme Court first addressed the issue of whether Fourth Amendment protections extend to prison inmates in *Lanza v. New York*.²⁴² In *Lanza*, the accused, Harry Lanza, had a conversation with his incarcerated brother in the visitor's room of a New York jail.²⁴³ Six days later Lanza's brother was released from custody by order of the State Parole Commission under unusual circumstances.²⁴⁴ Subsequently, a committee of the New York Legislature held an investigation of possible corruption in the state parole system.²⁴⁵ The committee called Lanza to testify regarding his conversation with his incarcerated brother.²⁴⁶ After granting Lanza immunity from prosecution, as permitted by state law, the committee directed him to answer several questions.²⁴⁷ After refusing to answer the committee's questions, Lanza was convicted in a state court for violating a state criminal statute.²⁴⁸ On appeal to the United States Supreme Court, Lanza argued that the interception of the jail conversation was a violation of the principles of the Fourth Amendment, which have been incorporated into the Due Process Clause of the Fourteenth Amendment.²⁴⁹ Lanza further argued that it was impermissible for the committee to have used transcripts of his conversation with his brother in interrogating him, and that the state, accordingly, had

238. *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).

239. *Id.* at 555-56.

240. William A. Harrington, *Fourth Amendment as Protecting Prisoner Against Unreasonable Searches and Seizures*, 32 A.L.R. FED. 601 (1977). See, e.g., *Bonner v. Coughlin*, 517 F.2d 1311, 1317 (7th Cir. 1975) (holding that prisoners are entitled to rights under the Fourth Amendment "to some minimal extent"); *Palmigiano v. Travisono*, 317 F. Supp. 776, 791 (D.R.I. 1970) (stating that prisoners are entitled to rights under the Fourth Amendment "subject to such curtailment as was made necessary by the purposes of confinement and the requirements of security"); *United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973) (stating that prisoners are entitled to rights under the Fourth Amendment "absent a showing of some justifiable purpose of imprisonment or prison security").

241. Kelly M. Haynes, *Constitutional Law—Electronic Surveillance in Prison: Are Any Constitutional Rights Violated?—State v. Calhoun*, 14 FLA. ST. U.L. REV. 319, 322 (1986).

242. *Lanza v. New York*, 370 U.S. 139 (1962).

243. *Id.*

244. *Id.* at 140.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 139.

249. *Id.* at 141.

denied him due process of law by convicting him for refusing to answer the questions propounded.²⁵⁰ The Court observed that in prison “official surveillance has traditionally been the order of the day.”²⁵¹ While the Court asserted that a prison shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room, it also acknowledged that “*even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection.*”²⁵² The Court ultimately upheld Lanza’s conviction introducing the concept of “constitutionally protected areas.”²⁵³

In 1967, however, without overruling *Lanza*, the Supreme Court articulated a different standard for determining the scope and limits of the Fourth Amendment, based not on the concept of a “constitutionally protected area,” but on what the Court termed the “reasonable expectation of privacy” of the person affected.²⁵⁴ In *Katz v. United States*, the accused, Charles Katz, was convicted under an indictment charging him with transmitting wagering information by telephone across state lines in violation of a federal statute.²⁵⁵ At trial, the government was permitted, over Katz’ objection, to introduce evidence of telephone conversations, overheard by federal agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the accused placed his calls.²⁵⁶ Rejecting arguments from both Katz and the prosecution on whether or not the area in question was a “constitutionally protected area,” the Court held that a person in a telephone booth, no less than one in a business office, a friend’s apartment, or a taxicab, could rely on the protection of the Fourth Amendment.²⁵⁷ The Court asserted that the “Fourth Amendment protects people, not places.”²⁵⁸ The Court added, “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”²⁵⁹ “But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”²⁶⁰ Justice Harlan, in his concurring opinion, pronounced that Fourth Amendment analysis is not a question of constitutionally protected places, but rather, the requirement, “first, that a person have exhibited an actual (subjec-

250. *Id.* at 141-42.

251. *Id.* at 143.

252. *Id.* at 143-44 (emphasis added).

253. *Id.* at 143. The Court stated that it was, at best, a “novel argument” to say that a public jail was the equivalent of a man’s house or that it was a place where one could claim immunity from search or seizure of his person, his papers, or his effects. *Id.*

254. *Katz v. United States*, 389 U.S. 347, 360 (1967).

255. *Id.* at 348.

256. *Id.*

257. *Id.* at 359.

258. *Id.* at 351.

259. *Id.*

260. *Id.*

tive) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"²⁶¹

More recently, the United States Supreme Court applied the expectation of privacy standard in the prison context.²⁶² In *Hudson v. Palmer*, the defendant, Russell Thomas Palmer, a prison inmate, was charged under the prison disciplinary procedure for destroying state property when an officer at the correctional center, Ted S. Hudson, discovered a ripped pillowcase near Palmer's cell during a "shakedown" search of Palmer's prison locker and cell for contraband.²⁶³ After a hearing, Palmer was found guilty on the charge and was ordered to reimburse the state for the cost of the material destroyed; in addition, a reprimand was entered on his prison record.²⁶⁴ Palmer subsequently brought a pro se action in United States District Court.²⁶⁵ Palmer claimed that the shakedown search of his cell was an unreasonable search in violation of the Fourth Amendment.²⁶⁶ The district court granted summary judgement in favor of Hudson.²⁶⁷ The Fourth Circuit Court of Appeals reversed and remanded, holding that the "shakedown" search was unreasonable.²⁶⁸ The Fourth Circuit held that a prisoner has a "limited privacy right" in his cell entitling him to protection against searches conducted solely to harass or to humiliate.²⁶⁹ Hudson appealed to the Supreme Court.²⁷⁰

The Supreme Court held that a prisoner has no reasonable expectation of privacy in his prison cell entitling him to the protection of the Fourth Amendment against unreasonable searches.²⁷¹ The Court reasoned that while prisoners enjoy many protections of the Constitution, many rights are circumscribed or lost in order to accommodate the institutional needs and objectives of prison facilities, particularly internal security and safety.²⁷² The Court went on to say that it would be impossible to accomplish the prison objectives of preventing the introduction of weapons, drugs, and other contraband into the premises if inmates retained a right of privacy in their cells.²⁷³ The Court held that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his

261. *Id.* at 361 (Harlan, J., concurring). Justice Harlan's concurrence clearly articulated the law that has been applied since *Katz*.

262. *Hudson v. Palmer*, 468 U.S. 517, 519 (1984).

263. *Id.* at 519.

264. *Id.* at 520.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 521.

269. *Id.*

270. *Id.*

271. *Id.* at 523.

272. *Id.* at 524.

273. *Id.* at 527.

prison cell.²⁷⁴ Accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.²⁷⁵

Lower courts have expressed a divided view on the extent that the Fourth Amendment protects prison inmates.²⁷⁶ The majority of courts have recognized or upheld a prisoner's right to protection under the Fourth Amendment, with certain qualifications.²⁷⁷ Still other courts have held that prisoners are not entitled to any protection against unreasonable searches and seizures under the Fourth Amendment.²⁷⁸

The Bureau of Prisons rule is distinguishable from cases determining whether the Fourth Amendment protections apply to prison inmates. Warrantless searches that courts have approved in the prison context, such as cell searches, and strip searches, have been based on the need to maintain

274. *Id.*

275. *Id.*

276. Harrington, *supra* note 240, § 2a.

277. *See* Oliver v. Scott, 276 F.3d 736, 744 (5th Cir. 2002) (stating that prisoners retain, at best, a very minimal Fourth Amendment interest in bodily privacy after incarceration); Peckham v. Wisconsin Dept. of Corrections, 141 F.3d 694, 697 (7th Cir. 1998) (stating that a prison inmate enjoys some protection under Fourth Amendment against unreasonable searches and seizures, notwithstanding considerable deference given prison officials in running their institutions); Ford v. City of Boston, 154 F. Supp. 2d 131, 139 (D. Mass. 2001) (holding that both convicted prisoners and pretrial detainees, and therefore pre-arraignment arrestees, retain constitutional rights despite their incarceration, including Fourth Amendment rights against unreasonable searches and seizures); Murcia v. County of Orange, 226 F. Supp. 2d 489, 498 (S.D.N.Y. 2002) (stating that the Fourth Amendment requires that searches and seizures be reasonable under the circumstances, even if performed on individuals who are incarcerated); Foote v. Spiegel, 995 F. Supp. 1347, 1349 (D. Utah 1998) (stating that prisoners and detainees retain a limited Fourth Amendment right to privacy in their bodies, including a right to have searches conducted reasonably).

278. *See* Willis v. Artuz, 301 F.3d 65, 67 (2d Cir. 2002) (holding that the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell); Rodriguez-Rodriguez v. U.S., 4 Fed. Appx. 637, 639 (10th Cir. 2001) (stating that prisoners are not protected under the Fourth Amendment from unreasonable searches of their prison cells or from the wrongful seizure of property contained in their cells); Hanrahan v. Lane, 747 F.2d 1137, 1139 (7th Cir. 1984) (stating that Fourth Amendment protection against unreasonable searches does not extend into a prison cell, and Fourth Amendment challenges to prison cell searches taken for any reason, whether or not reasonable, are precluded); Johnson v. Kalamazoo, 124 F. Supp. 2d 1099, 1103 (W.D. Mich. 2000) (stating that for Fourth Amendment purposes, a prisoner has no legitimate expectation of privacy in his prison cell); Ballance v. Virginia, 130 F. Supp. 2d 754, 761 (W.D. Va. 2000) (stating that a prisoner has no Fourth Amendment right to be free from unreasonable searches of his cell, since he has no expectation of privacy in cell).

In addition, many courts have rejected claims of unconstitutional searches and seizures granting deference to prison officials on prison security or correctional process. *See* Olsen v. Klecker, 642 F.2d 1115, 1117 (8th Cir. 1981) (concluding in a civil action brought by state prisoner claiming unconstitutional search of cell that trial court properly dismissed action since search of cell was conducted for valid security reason and was not unnecessarily obtrusive).

prison security.²⁷⁹ Courts have granted great deference to the expertise of prison officials in determining what is necessary to maintain prison security.²⁸⁰ In sharp contrast, the Bureau of Prisons rule was promulgated only for general law enforcement purposes, not for prison security reasons; consequently, the rule is in no way based on the special expertise of prison officials.²⁸¹

While the Court has been reluctant to find that prison inmates are entitled to Fourth Amendment protections against unreasonable searches and seizures, the Court has still recognized the need to protect "*relationships* which the law has endowed with *particularized confidentiality*," such as the attorney-client relationship.²⁸² Arguably, the Court recognized prisoners' Fourth Amendment right to private conversations with their attorneys by recognizing that certain confidential relationships "must continue to receive *unceasing protection*."²⁸³ The Bureau of Prisons rule completely ignores the Court's call for protection of confidential relationships in the prison setting.

Justice Harlan's concurrence in *Katz* established a two-pronged test for "reasonable expectations of privacy."²⁸⁴ First, the *Katz* rule requires that a person have an actual, subjective expectation of privacy.²⁸⁵ It would not be difficult for an inmate to establish that he subjectively expected that his conversation with his attorney would be private. In general, when people speak to attorneys, they subjectively *expect* those communications to stay private.²⁸⁶ Second, the *Katz* rule requires that the expectation be one that society is prepared to recognize as reasonable.²⁸⁷ The confidentiality of attorney-client communication is one of the strongest expectations of privacy recognized in our society.²⁸⁸ If this confidentiality is universally recognized, even after the client's death, then it stands to reason that the confidentiality sur-

279. *Hudson v. Palmer*, 468 U.S. 517, 530 (1984); *Covino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992).

280. *Hudson*, 468 U.S. at 517.

281. *Gentile*, *supra* note 216, at 107.

282. *Lanza v. New York*, 370 U.S. 144 (1962) (emphasis added).

283. *Id.* (emphasis added).

284. *Katz v. U.S.*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring). Courts since *Katz* have not used the *Lanza* "constitutionally protected area" test.

285. *Id.* (Harlan, J., concurring).

286. *See supra* notes 38-43 and accompanying text. Proponents of the Bureau of Prisons rule could argue that since the Department of Justice informs the inmates and attorneys that it can and may listen to conversations, the inmates have no expectation of privacy. Such a rationale allows the government to infringe on rights as long as it warns people ahead of time that it is going to do so. Moreover, the rationale forces inmates to make an unfair choice between constitutional rights: Waive the Sixth Amendment right to effective counsel by not telling attorneys relevant information or waive the Fifth Amendment rights to Due Process and against self-incrimination by telling attorneys relevant information even though it may be incriminating.

287. *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

288. *U.S. v. Zolin*, 491 U.S. 554, 562 (1989).

vives the client's incarceration.²⁸⁹ Inmates retain a reasonable expectation of privacy in their communications with their attorneys. The expectation of privacy associated with the attorney-client privilege is more than reasonable—it is necessary. Consequently, any interception of an inmate's communications with his attorney must be justified under the Fourth Amendment.

Under the Fourth Amendment, attorney-client communications cannot be intercepted without a warrant based on a finding of probable cause.

Over and again [the Supreme Court] has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes . . . and that searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.²⁹⁰

The point of the Fourth Amendment is that its protection requires law enforcement "inferences [to] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."²⁹¹ The Bureau of Prisons rule is contrary to this policy because it allows a potentially biased officer to determine whether a search is reasonable. The Bureau of Prisons rule not only requires a less stringent standard, it sidesteps the judiciary's role in determining whether probable cause exists.²⁹² Such a scheme "reduce[s] the [Fourth]

289. Gentile, *supra* note 216, at 104.

290. *Katz*, 389 U.S. at 357 (quoting *Wong Sun v. U.S.*, 371 U.S. 471, 481-82 (1963); *U.S. v. Jeffers*, 342 U.S. 48, 51 (1951)). Examples of exceptions for warrantless searches include "reasonableness" and "exceptional circumstances." See *Carroll v. U.S.*, 267 U.S. 132, 156 (1925); *McDonald v. U.S.*, 335 U.S. 451, 454 (1948); *Brinegar v. U.S.*, 338 U.S. 160, 174-77 (1949); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

291. *Johnson v. U.S.*, 333 U.S. 10, 14 (1948).

292. See *supra* notes 120-123 and accompanying text. The Bureau of Prison rule's infringement on the attorney-client privilege is based on *reasonable suspicion* that a particular inmate may use communications with attorneys to further or facilitate acts of terrorism.

Reviewing courts mak[ing] reasonable-suspicion determinations . . . must look at the 'totality of the circumstances' of each case to see whether the . . . officer has a 'particularized and objective basis' for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' . . . Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause . . .

U.S. v. Arvizu, 534 U.S. 266, 273-74 (2002) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).

Amendment to a nullity.”²⁹³ “When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.”²⁹⁴

Despite the general requirement for a warrant, “the vision of a tough, sweeping per se rule yielding only to the most demanding claims for exceptions is at odds with reality.”²⁹⁵ The Court’s warrant requirement “ha[s] become so riddled with exceptions that it [is] basically unrecognizable.”²⁹⁶ The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are unreasonable.²⁹⁷

Thus, many warrantless searches have been upheld because the search was reasonable.²⁹⁸ Consequently, the rule stating that warrantless searches are per se unreasonable applies in some situations, but it is an over-

In order to obtain a search warrant under the Fourth Amendment, a law enforcement officer must establish *probable cause*.

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge [or magistrate] who must evaluate the *reasonableness* of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective *standard*: [W]ould the facts available to the officer at the moment of the seizure or the search “warrant a man of *reasonable* caution in the belief” that the action taken was appropriate? Anything less would invite *intrusions* upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [the] Court has consistently refused to sanction. And simple good faith on the part of the arresting officer is not enough.

Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (emphasis added).

293. *Johnson*, 333 U.S. at 14.

294. *Id.*

295. SALTZBURG & CAPRA, *AMERICAN CRIMINAL PROCEDURE* 77 (6th ed. 2000).

296. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

297. *Id.* at 581.

298. The courts appear to use a balancing test when determining whether a search was reasonable. See *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. (citations omitted).

statement to suggest even that most searches and seizures require a warrant.²⁹⁹

The Supreme Court has noted that Fourth Amendment protections are different from the Fifth and Sixth Amendment protections in the criminal justice process.³⁰⁰ For example, the privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental *trial* right for criminal defendants.³⁰¹ Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial.³⁰² In addition, the Sixth Amendment's right to effective counsel protects the attorney-client privilege only in the context of criminal prosecution.³⁰³ The Fourth Amendment, on the other hand, prohibits "unreasonable searches and seizures" by the government whether or not the evidence is sought to be used in a criminal trial, and a violation is "fully accomplished" at the time of an unreasonable governmental intrusion.³⁰⁴ This is so regardless of whether the evidence is ever used in a criminal proceeding.³⁰⁵ Since the exclusion of seized evidence in a subsequent criminal proceeding is the only remedy ordinarily available for Fourth Amendment violations, a majority of Fourth Amendment violations go unreported and ignored.³⁰⁶ Consequently, the right to be secure against searches and seizures is one of the most difficult to protect.³⁰⁷

In light of the fact that most Fourth Amendment violations go unchallenged, the Supreme Court has often held that the Amendment should be given a "liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly, over-zealous executive officers."³⁰⁸ Thus, while proper criminal investigation requires that police have the authority to investigate suspicious activity thoroughly and disarm dangerous citizens, the Court has always maintained that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."³⁰⁹ Indeed, courts will scrutinize the

299. SALTZBURG & CAPRA, *supra* note 295, at 77.

300. *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 262 (1990).

301. *Id.* (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)).

302. *Id.* See also *Kastigar v. U.S.*, 406 U.S. 441, 453 (1972).

303. *Amar & Amar*, *supra* note 6, at 1164.

304. *Verdugo-Urquidez*, 494 U.S. at 262 (1990). See also *U.S. v. Calandra*, 414 U.S. 338, 354 (1974); *U.S. v. Leon*, 468 U.S. 897, 906 (1984).

305. *Verdugo-Urquidez*, 494 U.S. at 262; *Calandra*, 414 U.S. at 354.

306. *Brinegar v. U.S.*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

307. *Id.*

308. *Gouled v. United States*, 255 U.S. 303, 304 (1921).

309. *Terry v. Ohio*, 392 U.S. 1, 12, 19 (1968).

manner in which the search or seizure was conducted as much as they do its initial justification.³¹⁰

The right to consult an attorney in private is not limited to those facing criminal prosecution; it applies to all kinds of legal counseling.³¹¹ Much of what clients seek to discuss in any type of case may be sensitive or embarrassing, such as family disputes or personal finances, and the law has traditionally encouraged clients to confide broadly in their lawyers so that they can receive proper advice about their legal rights and duties.³¹² Confidentiality has traditionally been the cornerstone of the lawyer-client relationship.³¹³ Clients will hesitate to discuss delicate matters with their attorneys if they fear that their secrets will be disclosed.³¹⁴ This historic right to consult attorneys confidentially is a reasonable expectation of privacy protected by the Fourth Amendment, which broadly prohibits unreasonable government intrusions.³¹⁵

When applying the Fourth Amendment principles to the Bureau of Prisons rule, the obstruction of an inmate's ability to confide in his or her attorney is significant. Many of the detainees subject to the rule are never prosecuted nor convicted of any crime.³¹⁶ Some of the inmates are simply material witnesses.³¹⁷ Even those being detained on criminal charges may have a special need for confidential legal advice reaching far beyond matters related to a criminal case. For example, detention may put pressure on a detainee's marriage, threaten his business, threaten his reputation, cause financial strain on him and his family, adversely affect the health of his aging parents, or cause his children to misbehave in school.³¹⁸ Such a detainee might want to consult a lawyer about a wide range of legal issues outside the scope of the Fifth and Sixth Amendments, which only apply in criminal

310. *Id.* at 28.

311. Amar & Amar, *supra* note 6, at 1164.

312. *Id.*

313. *Id.*

314. *Id.*

315. See *Lanza v. New York*, 370 U.S. 139, 144 (1962); *Katz v. U.S.*, 389 U.S. 347 (1967).

316. 28 C.F.R. § 500.1. This is important to note because, for those inmates who are never prosecuted, the Sixth Amendment will never be at issue, but the Fourth Amendment may be.

317. The Bureau of Prisons rule defines inmates as "all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise." 28 C.F.R. § 500.1. A "material witness" is a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about those matters. BLACK'S LAW DICTIONARY 1597 (7th ed. 1999).

318. Amar & Amar, *supra* note 6, at 1164.

cases, but well within a reasonable expectation of privacy protected under the Fourth Amendment.³¹⁹

The Fourth Amendment protects communications related to criminal and noncriminal matters between an inmate and his or her attorney.³²⁰ Eavesdropping on conversations has long been held to be a Fourth-Amendment protected "search."³²¹ Therefore, the Fourth Amendment applies to the searches under the Bureau of Prisons rule. The fact that the Bureau of Prisons rule allows eavesdropping with notice rather than in secret does not eliminate the Fourth Amendment concerns.³²² The amendment covers all searches and seizures, not just secret ones.³²³

A cardinal rule of both Fourth Amendment and attorney-client privilege law is that infringements on law-abiding private activity should be no broader than necessary.³²⁴ The current Bureau of Prisons rule infringes on a relationship which the law has endowed with particularized confidentiality.³²⁵ In addition, the Bureau of Prisons rule applies to more than dangerous criminals; it also precludes innocent people from enjoying a long-recognized expectation of private communications with their attorneys, thus making the rule broader than necessary.

III. The Bureau of Prisons Rule Raises Policy Concerns

A. The Bureau of Prisons Rule is Vague

Despite the horrific nature of the September 11, 2001, attacks and the widespread support for government efforts to protect our nation against future attacks, there are several aspects of the monitoring regulations that have provoked scholarly criticism.³²⁶

First, the Bureau of Prisons rule has contradictions within its various sections. At first glance, the rule appears to require that the government provide written notice before any eavesdropping can occur. However, when read as a whole, the rule seems to allow eavesdropping without notice to the

319. *Id.*

320. The inquiry for such Fourth Amendment issues is whether the inmate has a reasonable expectation of privacy. *Katz v. U.S.*, 389 U.S. 347, 362 (1967).

321. *Id.* at 359.

322. 28 C.F.R. § 501.3(d).

323. The cases addressing eavesdropping on conversations involved law enforcement agents surreptitiously listening to conversations via wiretap or other type of electronic surveillance. *See Katz v. U.S.*, 389 U.S. 347 (1967). This is distinguished from the Bureau of Prisons rule because, under the Bureau of Prisons rule, inmates know that federal agents can and may listen in on their conversations. 28 C.F.R. § 501.3(d).

324. *Johnson v. U.S.*, 333 U.S. 10, 17 (1948).

325. *Amar & Amar*, *supra* note 6, at 1166.

326. *Cole*, *supra* note 13, at 553.

inmate or the attorney. Subdivision (d)(2) of the rule states, “[E]xcept in the case of *prior* court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph”³²⁷ Accordingly, the rule requires written notice only when there has been no prior judicial approval.³²⁸ This seems to be an important exception and the most difficult issue for attorneys. The lawyer will be obliged to tell the inmate that he or she does not know whether a court has approved eavesdropping.³²⁹ Neither the inmate nor the lawyer will ever know for sure whether eavesdropping is occurring. This will likely chill the communications immensely.³³⁰

Second, the very language of the order itself is extremely vague.³³¹ The order gives enormous discretion to the Attorney General and those under him to decide the extent to which a particular case is subject to these regulations.³³² Much of the language in 28 C.F.R. §§ 500-501 is not clearly defined. Certain words used throughout the order such as “terrorism,” “acts of violence,” and “future acts that could result in death or serious bodily injury to persons” can encompass a variety of behaviors.³³³ “Reasonable suspicion” is also a very vague standard for judging whether future acts of terrorism are likely to occur.³³⁴ In application, the Bureau of Prisons rule

327. 28 C.F.R. § 501.3(d)(2) (emphasis added).

328. *Id.*

329. *Id.*

330. *See supra* note 191-92 and accompanying text.

331. 28 C.F.R. § 501.3(d).

332. The Bureau of Prisons rule provides:

In any case . . . [where] . . . a reasonable suspicion exists to believe that a particular inmate may use communications with attorneys . . . to further or facilitate acts of terrorism, the . . . Bureau of Prisons, shall . . . monitor[] or review . . . communications between that inmate and attorneys . . . [in order to prevent] . . . death or serious bodily injury

28 C.F.R. §§ 501.3(d) (emphasis added). *See supra* note 11 for full text of regulation. In addition, the Rule provides:

[The Director of Bureau of Prisons] . . . shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials . . . are not retained during the course of the monitoring. . . . [A] privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures [in order] to minimize the intrusion into privileged material or conversations. Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

28 C.F.R. § 501.3(d)(3) (emphasis added). *See also* Cole, *supra* note 13 at 552.

333. Cole, *supra* note 13, at 552.

334. *Id.*

will allow a head of a federal law enforcement or intelligence agency to determine that reasonable suspicion exists.³³⁵ This essentially leaves the determination of what is suspicious to one person's discretion.³³⁶ What is suspicious to one person may be completely normal behavior to another. According to the rule, any properly privileged materials will not be retained during the course of the monitoring.³³⁷ Who, specifically, determines what constitutes "properly privileged material" is not addressed.³³⁸ This ambiguous language inherent in the regulation could allow the government to justify the need to listen in on any conversation between a criminal defendant and his attorney.³³⁹ The lack of checks and balances in the regulatory scheme coupled with the vagueness of the language in the rule increases the chances that the privileged material will be disclosed and/or used in other proceedings.³⁴⁰

In John Ashcroft's testimony before the Senate Judiciary Committee, he defended the Bureau of Prisons rule.³⁴¹ He stated that "[n]one of the information that is protected by attorney-client privilege may be used for prosecution."³⁴² However, he did not state that the order would *prohibit* the use of *all* seized communications; only those believed to be already protected by the attorney-client privilege would be protected.³⁴³ The question then arises as to who exactly will determine when the attorney-client privilege attaches to conversations.³⁴⁴

The rule states that the Bureau of Prisons will establish a "privilege team" that will consist of people who are not involved in the investigation or prosecution of the monitored inmate.³⁴⁵ The purpose of the team is to ensure that only appropriate uses are made of the information obtained through the monitoring.³⁴⁶ However, the rule does not say who will make up these privilege teams.³⁴⁷

335. 28 C.F.R. § 501.3(d).

336. See *supra* note 122-23 and accompanying text.

337. 28 C.F.R. § 501.3(d)(3).

338. *Id.*

339. Rice & Saul, *supra* note 6, at 24.

340. *Id.*

341. DOJ Oversight: *Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Sen. Comm. On the Judiciary*, 107th Cong. (2001) (testimony of Att'y Gen. John Ashcroft), available at http://judiciary.senate.gov/testimony.cfm?id=121&wit_id=42 (last visited Dec. 1, 2003).

342. *Id.*

343. Rice & Saul, *supra* note 6, at 24.

344. *Id.* at 23.

345. 28 C.F.R. § 501.3(d)(3).

346. Cole, *supra* note 13, at 549.

347. Rice & Saul, *supra* note 6, at 23.

The "privilege team" will most likely be made up of persons from the executive branch.³⁴⁸ The order states that the "privilege team" may only disclose information with the approval of a federal judge *except* "where the person in charge of the privilege team determines that acts of violence or terrorism are imminent."³⁴⁹ Consequently, the team may act without the approval of a federal judge in certain situations, which raises serious concerns regarding the lack of judicial oversight involved.³⁵⁰ The executive branch could, in essence, endorse its own actions.³⁵¹ The order is silent about review of privilege team decisions and leaves us guessing who, if anyone, will make these crucial determinations, such as when acts of violence or terrorism are imminent.³⁵²

Another serious concern raised by the order is the effectiveness of the privilege teams. The screening of communications by the privilege team does indeed add a safeguard to the procedures articulated in the order.³⁵³ Such screening, however, does not guarantee that privileged conversations between an attorney and a client will not be disclosed to investigators or prosecutors.³⁵⁴ The privilege team has to determine when "acts of violence or terrorism are imminent."³⁵⁵ To determine whether a certain conversation relates to an imminent act is a daunting task.³⁵⁶ Furthermore, what exactly is imminence?³⁵⁷ The concern that this issue raises is that, sometimes, the team may feel inclined to disclose a great deal of material simply by claiming that it may help prevent an imminent attack.³⁵⁸ Moreover, the team could easily justify its own actions under these guidelines.³⁵⁹ Another question raised is to whom the team will communicate the privileged material. The order directs disclosures to be made to persons or agencies attempting to prevent acts of terrorism.³⁶⁰ There is no guarantee that the information will not be more widely released and confidentiality further undermined.³⁶¹ Despite the government's efforts to establish a "Chinese wall" for the protection of monitored communications, the order remains vague and therefore problematic.³⁶²

348. *Id.* at 24.

349. 28 C.F.R. § 501.3(d)(3).

350. Cole, *supra* note 13, at 552.

351. Rice & Saul, *supra* note 6, at 24.

352. *Id.* at 23.

353. *See* 28 C.F.R. § 501.3(d)(3).

354. *See supra* notes 219-20 and accompanying text.

355. 28 C.F.R. § 501.3(d)(3).

356. *See* Rice & Saul, *supra* note 6, at 24.

357. *Id.*

358. *Id.*

359. *Id.*

360. *See* 28 C.F.R. § 501.3.

361. *See* Rice & Saul, *supra* note 6, at 24.

362. *Id.*

Another exception to the general rule that the privilege team may not disclose privileged information is that the privilege team may disclose information when a federal judge has approved such disclosure.³⁶³ The term "federal judge" extends beyond an Article III judge and includes judges of military tribunals, who are executive branch officials, set up to try suspected terrorists.³⁶⁴ Again, the executive branch will be sanctioning its own conduct and judicial safeguards will be removed.³⁶⁵

Allowing the government to monitor attorneys and clients whose communications have been traditionally privileged could have widespread ramifications. This is especially true if so many questions are left unanswered and the terms of the regulation are not more clearly defined. Considering the government's traditional authority during wartime and the special administrative measures that the Bureau of Prisons has had in effect since 1996, this comment does not suggest that the entire order is unnecessary and an overreaching of the government's authority.³⁶⁶ However, this comment does suggest that the Bureau of Prisons rule is perhaps simply misguided.³⁶⁷ Considering that our nation is under the constant threat of terrorism, we must establish a clear long-term policy.³⁶⁸ It is imperative that we define not only the specific terms of the order but also impose greater limits on a very general order.³⁶⁹ These limits should remain founded on the Constitution.³⁷⁰

B. The Bureau of Prisons Rule Fails to Balance Civil Liberties and Prevention of Terrorism

Possibly the most crucial aspect of the rule that must be addressed is to what extent we, as a nation, are willing to compromise our freedoms to prevent terrorism. Because of the fear that was generated by the terrorist attacks, some Americans expressed a willingness to relinquish some of their freedoms. We are faced with the serious task of balancing long recognized freedoms, such as the right to confidentiality between an attorney and client, against the need for exposing threats of terrorism and protecting our nation.³⁷¹ While security may be worth some limitations placed on freedoms, even small infringements over time may become major compromises that alter this country's way of life.³⁷²

363. 28 C.F.R. § 501.3(d)(3).

364. Rice & Saul, *supra* note 6, at 24.

365. Cole, *supra* note 13, at 553.

366. *Id.*

367. *Id.*

368. Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 272 (2003).

369. *See id.*

370. *See id.*

371. *See supra* notes 27-31 and accompanying text.

372. Whitehead & Aden, *supra* note 2, at 1084.

This balancing of security and freedom is not a new dichotomy. History demonstrates that in times of war, the courts have been willing to uphold laws that limit rights otherwise protected by the Constitution.³⁷³ In 1798, just after the First Amendment to the Constitution had been enacted and as the United States was on the verge of war with France, Congress passed the Sedition and Alien Act.³⁷⁴ A century later, during the Civil War, Abraham Lincoln unilaterally made the decision to suspend the writ of *habeas corpus*.³⁷⁵ During World War I, Congress enacted the Espionage Act of 1917, which made it a crime during a time of war to make false statements with the intent to interfere with the success of United States military forces or military recruiting.³⁷⁶ Within weeks of the bombing of Pearl Harbor, the United States government rounded up thousands of Americans of Japanese descent and herded them into internment camps even though none of them were charged with a crime.³⁷⁷ This action was within the war power of Congress and the Executive, as it related to prevention of espionage and sabotage.³⁷⁸ During the Cold War of the 1950s, Congress, frightened by tales of communist subversion, conducted a “witchhunt for communists through a

373. *Id.*

374. Associate Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Address Before the Law School of Hebrew University 1, 2 (December 22, 1987) available at http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf (last visited Dec. 1, 2003). The Sedition Act of 1798 made it a crime to criticize the President. Act of July 14, 1798, ch. 73, 1 Stat. 596 (expired 1801). The Alien Act of 1798 empowered the President to expel any alien he judged dangerous and to arrest all subjects of warring foreign nations as alien enemies. Act of July 6, 1798, ch. 58, 1 Stat. 577 (expired June 25, 1800).

375. Brennan, *supra* note 374, at 2. *Habeas corpus* is a procedure employed to ensure that a party's imprisonment or detention is not illegal. BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

With habeas corpus suspended, Lincoln caused [20,000] to 30,000 persons to be arrested and detained in military custody without charges, simply because those persons were suspected of being disloyal, dangerous, or disaffected. These persons remained in custody as long as the government saw fit, some receiving no trials at all, others receiving a military trial which lacked the procedural safeguards that would have been guaranteed by a civilian criminal court.

Brennan, *supra* note 374, at 3.

376. Brennan, *supra* note 374, at 4.

This Act provided the predicate for confiscating anti-war films and raiding the offices of anti-war organizations. In 1918 the Act was amended to make it a crime also to ‘willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about’ the U.S. form of government, Constitution, flag, or its military forces or uniform ‘or any language intended to bring the [same] into contempt, scorn, contumely, or disrepute.’

Id.

377. *Id.* at 6. See 18 U.S.C.A. § 1383.

378. 18 U.S.C. § 1383. See also *Korematsu v. U.S.*, 323 U.S. 214, 217 (1944).

series of committee investigations, and enacted various laws including the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954, aimed at flushing out those with communist beliefs.³⁷⁹

Unfortunately, history repeats itself. After each perceived security crisis ended, the United States remorsefully realized that the abrogation of civil liberties was unnecessary.³⁸⁰ However, the United States has been unable to prevent itself from repeating the error when the next crisis comes along.³⁸¹

The Bureau of Prisons rule is another example of our country's tendency to "get swept away by irrational passion and to accept gullibly assertions that in times of repose would be subjected to the critical examination they deserve."³⁸² Despite the government's claim that the rule's intrusion into the attorney-client relationship and interference with the constitutionally guaranteed right to counsel in criminal cases is justified, Americans should not underestimate the impact that such an infringement will have in the long run.³⁸³ Americans should not assume that "freedoms forsaken today might somehow be regained tomorrow."³⁸⁴

Although it is not uncommon for civil liberties to be challenged in times of war or national emergency, there is something different about the threats to civil liberties today.³⁸⁵ The threats that we are facing today are different in that constitutional rights are being overridden by executive power in order to protect national security rather than through congressional enactments.³⁸⁶ In addition, we have entered a new kind of war—a war on terrorism that has no end in sight.³⁸⁷ Unlike previous wars, the enemies we face today probably will not reach a truce, which would signal the return of civil liberties.³⁸⁸ This makes the threat to our liberties even more profound.³⁸⁹ While no one should question the importance of appropriate law

379. Brennan, *supra* note 274, at 7; Smith Act, Act of June 25, 1948, ch. 645, 62 Stat. 808 (codified at 18 U.S.C. § 2385). The Smith Act made it a crime to become a member of any society which advocated overthrowing the government or destruction of any government of the United States by force or violence. *Id.* The Smith Act also made it a crime to print any written or printed material advocating such overthrow or destruction with the intent to cause it to come about. *Id.* See also Brennan, *supra* note 273, at 7; Internal Security Act of 1950, Act of Sept. 23, 1950, ch. 1024, Title I, § 2, 64 Stat. 987 (repealed Dec. 17, 1993); Communist Control Act of 1954, Act of Sept. 23, 1950, ch. 1024, 64 Stat. 987 (repealed Dec. 17, 1993).

380. Brennan, *supra* note 274, at 1.

381. *Id.*

382. *Id.* at 8.

383. Whitehead & Aden, *supra* note 2, at 1085.

384. *Id.*

385. Lewis, *supra* note 368, at 264.

386. *Id.*

387. Whitehead & Aden, *supra* note 2, at 1085.

388. *Id.*

389. Lewis, *supra* note 368, at 264.

enforcement responses to the threats to national security, it is fair to question some of the tactics that law enforcement officials have been employing as they combat crime in this complex and challenging environment.³⁹⁰

It is crucial to the welfare of our nation that we examine these threats to our civil liberties.³⁹¹ As Benjamin Franklin reminded his fellow colonists “they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”³⁹²

C. The Bureau of Prisons Rule Undermines the Model Rules of Professional Conduct

“In many respects, the Bureau of Prisons rule is unnecessary when the lawyer is an ethical practitioner.”³⁹³ Under Model Rule 1.2(d) “a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”³⁹⁴ The message that the Bureau of Prisons rule is sending to lawyers is that even though they have ethical obligations and duties, they still need to be monitored. In essence, this order undermines the ABA Model Rules of Professional Conduct and the sanctions that accompany them.

The Model Rules do not make the obligation on lawyers to disclose information mandatory but simply operate as an ethical guide. Model Rule 1.6(b)(1) states that “[a] lawyer may reveal [communications] relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.”³⁹⁵

The Model Rules of Professional Conduct require an attorney to provide competent representation to a client.³⁹⁶ Part of this requirement is protecting the attorney-client privilege. In addition, a lawyer may not talk to his client about confidential information if a third party is present.³⁹⁷ Such a communication in the presence of another party would, in effect, waive the attorney-client privilege.³⁹⁸ If there is a possibility that a third party is listening, then the attorney cannot ethically speak to his client, and he has a duty to inform his client that anything the client says may constitute a waiver of

390. Cole, *supra* note 13, at 469.

391. *Id.*

392. Dihl, *supra* note 36, at 399.

393. Cover, *supra* note 1, at 1257.

394. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003). Not all states have adopted the Model Rules of Professional Conduct, but most states have adopted the Model Rules or similar requirements.

395. MODEL RULES OF PROF'L CONDUCT R. 1.6(d) (2003).

396. MODEL RULES OF PROF'L CONDUCT R. 1.0 (2003).

397. Cover, *supra* note 1, at 1256.

398. *Id.*

the privilege.³⁹⁹ The attorney should not talk to his client if he cannot guarantee privilege.⁴⁰⁰

IV. The Department of Justice Should Consider Other Methods for Monitoring Attorney-Client Communications

The purpose of the Bureau of Prisons rule is to fight the war on terrorism. There is a common consensus that law enforcement needs effective tools to protect our nation and its citizens against terrorism. The question to be answered is whether the Bureau of Prisons rule is either necessary or effective in accomplishing its purpose.

The Bureau of Prisons rule is not the only means by which the government can obtain information from attorney-client confidences. The existing law prior to the Bureau of Prisons rule adequately provided for *judicially sanctioned* monitoring and disclosure of communications between clients and their attorneys when necessary to prevent criminal activity or when there was a threat to national security.⁴⁰¹

One sufficient method already in place for obtaining privileged information when necessary is the common law crime-fraud exception.⁴⁰² Under the common law crime-fraud exception, when a judge determines that a communication is undertaken for the purpose of committing a crime or fraud, he or she can find an exception to the attorney-client privilege, and permit disclosure of the communication.⁴⁰³ The most significant difference between this judicial exception and the Bureau of Prisons rule is that the Bureau of Prisons rule limits the necessary role of the courts in determining whether the communication loses its privileged nature.

The crime-fraud exception provides an important limitation on the availability of the attorney-client privilege.⁴⁰⁴ The exception allows government officials to obtain judicial review of improper assertions of the at-

399. *Id.* This brings us back to Sixth Amendment implications, because it strips the inmate of his right to legal representation. See *supra* notes 142-198 and accompanying text for a discussion of Sixth Amendment rights.

400. *Id.*

401. Cohn, *supra* note 32, at 1246.

402. See *supra* notes 62-65 and accompanying text for discussion of crime-fraud exception.

403. *Id.* If federal officials have probable cause to believe that a detainee is using communications with his attorney to further a criminal purpose, they can obtain a search warrant to intercept these communications. *Id.* See also *supra* notes 290-99 and accompanying text. Federal law enforcement can also search an attorney's office if they have a search warrant supported by probable cause. Cohn, *supra* note 32, at 1246. If prison officials have probable cause to believe an inmate is using legal mail for unlawful purposes or if security is threatened by the mail, they can obtain a search warrant to open and read the mail. *Id.*

404. Cole, *supra* note 13, at 506.

torney-client privilege.⁴⁰⁵ Absent some evidence that the crime-fraud exception is not adequate to protect against abuses of the system, the Department of Justice should not seek to undercut the overall availability of the attorney-client privilege to prison inmates.⁴⁰⁶

In addition to the common law crime-fraud exception, Congress had already enacted a complex set of laws prior to the Bureau of Prisons rule that set the boundaries for interception of communications in order to protect national security.⁴⁰⁷ Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Foreign Intelligence Surveillance Act of 1978 provide for the interception of certain privileged materials.⁴⁰⁸ The Bureau of Prisons rule circumvents the legislative function.⁴⁰⁹ Regulation of conversation monitoring is a matter properly left to Congress.⁴¹⁰ Procedures mandated by Congress in Title III and the Foreign Intelligence Surveillance Act include judicial oversight before monitoring, but allow the government to temporarily bypass a judicial officer in emergency situations.⁴¹¹

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, allows the government, through eavesdropping and electronic surveillance, to monitor certain communications between attorneys and their clients.⁴¹² Under this Act, law enforcement officials may eavesdrop by obtaining a warrant for electronic surveillance when searching for information related to serious crimes “that an individual is committing, has committed, or is about to commit.”⁴¹³ Title III establishes several requirements that must be met in order for a warrant to be secured. First, the warrant must be based on probable cause for belief that an individual has or will commit an enumerated crime.⁴¹⁴ Second, there must be “probable cause for belief that particular communications concerning that offense will be obtained through such interception.”⁴¹⁵ And thirdly, “normal investigative procedures must have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”⁴¹⁶ Title III not only establishes requirements necessary for law enforcement officials to obtain a warrant for eavesdropping, but also requires that a judge of “competent jurisdiction”

405. *Id.*

406. *Id.*

407. *Id.*

408. 18 U.S.C. §§ 2510-2521 (2000); 50 U.S.C. § 1801 (2000).

409. Gentile, *supra* note 216, at 104.

410. *Id.*

411. *Id.*

412. *See* 18 U.S.C. §§ 2510-2521 (2000). Title III does not prohibit the government from monitoring attorney-client communications, but it generally precludes the use of such communications as evidence. *Id.* § 2517(4), (5).

413. *Id.* §§ 2518(3)(a). *See also id.* § 2516(1).

414. *Id.* § 2518(3)(a). *See id.* § 2516 for a list of other enumerated crimes.

415. *Id.* § 2518(3)(b).

416. *Id.* § 2518(3)(c).

must issue the wiretap order.⁴¹⁷ The warrant is valid for thirty days.⁴¹⁸ National security is one of the grounds enumerated in the statute for obtaining a warrant.⁴¹⁹ In addition, Title III allows monitoring conversations without judicial authorization *only* in emergency situations where there is a threat of death, serious injury, or a national security threat.⁴²⁰ In these cases, Title III still requires law enforcement to apply for a surveillance order within forty-eight hours after the interception.⁴²¹ Title III prohibits the use of intercepted privileged communications as evidence.⁴²²

Title III was written to create limited authority for electronic surveillance and investigation of specified crimes thought to lie within the province of organized criminal activity, and it was designed to conform to prevailing constitutional standards.⁴²³ The purpose of Title III is to provide law enforcement officials with tools necessary to promote more effective control of crime without unnecessarily infringing on an individual's right of privacy.⁴²⁴ Congress carefully balanced the law enforcement interest in obtaining information against the public interest in ensuring privacy when it enacted Title III.⁴²⁵

The Foreign Intelligence Surveillance Act is another formal mechanism that was already in place to oversee the use of electronic surveillance when there is a threat to national security.⁴²⁶ The Foreign Surveillance Intelligence Act was enacted in 1978 and is the equivalent to Title III for foreign

417. *Id.* § 2518(1), (3), (8)(b), (d). A judge of competent jurisdiction is "a judge of a United States district court or a United States court of appeals; and [a] judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications." *Id.* § 2510.

418. *Id.* § 2518(5).

419. *Id.* § 2511(2)(f).

420. *Id.* § 2518(7)(a)(i), (ii), (iii).

421. *Id.* § 2518(7).

422. *Id.* §§ 2510-21.

423. *U.S. v. Kalustin*, 529 F.2d 585, 588 (9th Cir. 1975).

424. *U.S. v. United States District Court for Eastern District*, 407 U.S. 297, 311 n.9 (1972).

425. *Gentile*, *supra* note 216, at 104.

426. 50 U.S.C. § 1801(e) (2000). "Foreign Intelligence Information" is defined as:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; (B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to (A) the national defense or security of the United States; or (B) the conduct of the foreign affairs of the United States.

intelligence wiretapping conducted in the United States.⁴²⁷ The Act established the Foreign Intelligence Surveillance Court, which approves wiretaps in national security investigations.⁴²⁸ This court is comprised of Article III judges designated by the Chief Justice of the United States.⁴²⁹ To obtain a warrant, the court must find that there is probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power and that each of the places at which the electronic surveillance is directed is being used or will be used by a foreign power or agent of a foreign power.⁴³⁰ The application must also contain a certification by a designated national security official that a significant purpose of the surveillance is to obtain foreign intelligence information.⁴³¹ The warrant application must also be approved by the Attorney General.⁴³² The Foreign Intelligence Surveillance Act, like Title III, also provides for the suppression of evidence which is protected by the attorney-client privilege.⁴³³

Another method by which law enforcement may obtain information from attorney-client communications is by issuing grand jury subpoenas to lawyers.⁴³⁴ Such interference with the attorney-client privilege may occur without judicial approval; however, such interference is not as invasive or detrimental to the attorney-client relationship as is pervasive monitoring.⁴³⁵

427. Cohn, *supra* note 32, at 1247.

428. 50 U.S.C. § 1801 (2000).

429. *Id.* § 1805(a)(3).

430. Cohn, *supra* note 32, at 1247.

431. 50 U.S.C. § 1803.

432. *Id.*

433. See 50 U.S.C. § 1806(a) (2000) ("No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character."). See *United States v. Belfield*, 692 F.2d 141, 146 (D.C. Cir. 1982) (stating that any evidence obtained or derived from electronic surveillance may be used in a criminal proceeding only in accordance with the procedures outlined in 50 U.S.C. § 1806).

First, authorization to use the information in a criminal proceeding must be obtained from the attorney general. 50 U.S.C.S. § 1806(b). Then, the government notifies the court in which the criminal proceeding is pending and the "aggrieved person" against whom the information is offered. 50 U.S.C.S. § 1806(c). The aggrieved person may make a motion to suppress on the ground that the surveillance is illegal Alternatively, even when the government purports not to be offering any evidence obtained or derived from the electronic surveillance, a defendant may claim that he is the victim of an illegal surveillance and seek discovery of the logs of the overhearers to ensure that no fruits thereof are being used against him. In either event, the government may forestall the defendant's suppression or discovery motions by filing a petition with the United States district court in the area where the criminal trial is taking place asking for a determination of the legality of the surveillance. 50 U.S.C.S. § 1806(f).

Id.

434. Cover, *supra* note 1, at 1243.

435. *Id.*

When a lawyer is subpoenaed, the attorney-client privilege applies in grand jury proceedings.⁴³⁶ The attorney may assert the privilege on behalf of his client, but if the court orders the attorney to testify, all that is required after the attorney or the client asserts the privilege is a reasonable opportunity to be heard and prompt appellate review.⁴³⁷ This illustrates another example of the importance of judicial oversight to safeguard an accused against zealous prosecution.

Even the Justice Department recognized the importance of the attorney-client privilege when it instituted internal guidelines regarding subpoena requests.⁴³⁸ The guidelines recommend that law enforcement exhaust alternative means of obtaining the information sought, show that the need for a subpoena outweighs the harm done to the attorney-client relationship, narrowly tailor the subpoena, and refrain from seeking privileged information.⁴³⁹

Another possible alternative to the application of the Bureau of Prisons rule is to appoint special masters in lieu of the privilege teams. The main objection to the monitoring of attorney-client communications under the Bureau of Prisons rule is that the executive branch does the monitoring.⁴⁴⁰ Even if the screen created by the "privilege team" is opaque, the prisoner is likely to be stifled in his conversations with his attorney because of the fear of leakage from the "privilege team" to the prosecution team.⁴⁴¹ This situation could be remedied if members of the executive branch played no role in monitoring and a court-appointed master who would be able to obtain security clearance in an expedited manner engages in the monitoring. The special master could also be knowledgeable about investigative techniques, and would maintain impartiality, integrity, competence, and diligence beyond reproach. Such a solution would not only resolve any problems with checks and balances within the executive branch, it would also provide the government with a means of monitoring questionable communications between inmates and their attorneys.⁴⁴²

A final alternative to the Bureau of Prisons rule is to change the Model Rules of Professional Conduct. The Model Rules do not require a lawyer to disclose information in order to prevent death or injury to another person. The rules state that lawyer *may* reveal such confidential informa-

436. 38A C.J.S. *Grand Juries* § 147 (1996).

437. *Id.* However, comments to the Rules of Professional Conduct state that the lawyer *should* assert the attorney-client privilege on behalf of the client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 11.

438. 38A C.J.S. *Grand Juries* § 147 (1996).

439. Cover, *supra* note 1, at 1243.

440. *See supra* notes 348-352 and accompanying text.

441. *See supra* notes 353-362 and accompanying text.

442. *See supra* notes 338-43, 368-70 and accompanying text.

tion.⁴⁴³ The Model Rules should be revised to require disclosure if the lawyer reasonably believes it necessary to prevent death or substantial bodily harm.⁴⁴⁴ This would perhaps address the concerns of the Justice Department as to the questionable behavior of some attorneys. Presently, only eleven states require lawyers to disclose information to prevent death or serious bodily harm.⁴⁴⁵

The purpose of the Bureau of Prisons rule is to prevent terrorists from communicating through their attorneys to further acts of violence or terrorism and to advance the government's ability to obtain information about impending attacks.⁴⁴⁶ Yet under the Bureau of Prisons rule, without a court order, an inmate and his attorney must be notified if the government may monitor their communications.⁴⁴⁷ It is difficult to imagine that an attorney and an inmate will plot terrorist activities knowing that the conversation may be monitored.⁴⁴⁸ A clandestine, court-sanctioned wire tap or prior court-issued warrant would likely be more effective in accomplishing the goals of the Bureau of Prisons rule.⁴⁴⁹

The legal framework prior to the Bureau of Prisons rule recognized the critical role judges play in balancing the policies of the attorney-client privilege with public safety. Available procedures exist and further measures can be adopted that would afford judges the opportunity to determine the applicability of privileges and possible exceptions.⁴⁵⁰ The existing law enforcement tools were already broad enough in scope to allow for obtaining information, with judicial review, when national security was threatened. Furthermore, in today's state of heightened national security, there is not a judge who would risk a terrorist attack by denying a well-supported request for a warrant. There is no justification for eliminating judicial review in order to obtain privileged information. This is a precedent that threatens to negate the cornerstone of our system of checks and balances and the right to an effective legal defense.

CONCLUSION

Whether the underlying principle for the attorney-client privilege is grounded in professional ethics, the right to privacy, or the need to encourage clients to confide fully in their attorneys, the privilege is a vital fixture of

443. MODEL RULES OF PROF'L CONDUCT R. 1.6(d) (2003).

444. Roger C. Crampton and Lori P. Knowles, *Professional Secrecy and its Exception: Spalding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 124 (1998).

445. John M. Burman, *Lawyer's and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. OF GENDER & L. 207, 246 (2003).

446. Gentile, *supra* note 216, at 108.

447. *Id.*

448. *Id.*

449. *Id.*

450. Cover, *supra* note 1, at 1244.

the American criminal justice system.⁴⁵¹ In today's state of heightened national security, due to the various organizations such as Al Qaeda that are a constant threat to the United States, rules are being promulgated for the purpose of national security and the prevention of terrorism. It is crucial that people feel safe and secure in these perilous times.⁴⁵² Although the possibility of terrorism is of great concern, we cannot fail to protect our constitutional freedoms. As one commentator noted,

Most critically, we must oppose the fatalism that has captured the minds and hearts of too many Americans. We should reject the premise that after September 11 we can no longer afford the privacy of freedom that we previously enjoyed. The United States has survived world war, presidential assassination, domestic riots, and economic depression. We have had nuclear weapons targeted on the nation's capital by foreign adversaries for much of the twentieth century. But none of these developments has required a permanent sacrifice in the structure of liberty established by the Constitution or by law, or, specifically, a sacrifice of the individual's freedom to limit the oversight of the government. . . . We have a duty to safeguard privacy, to oppose secrecy, and to ensure the protection of constitutional freedom.⁴⁵³

The confidential relationship between an attorney and client sits at the heart of our criminal justice system.⁴⁵⁴ It must be zealously guarded or we will find ourselves in the midst of a police state.⁴⁵⁵ These issues are relevant to all who value the freedoms our Constitution guarantees. The question remains whether the intrusion into the attorney-client privilege will continue unchecked, with the ultimate outcome that the presumption of confidentiality is completely reversed and the privilege is lost entirely.⁴⁵⁶

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451. Cohn, *supra* note 32, at 1254.

452. *Id.* at 1255.

453. Marc Rotenberg, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115, 1135 (2002).

454. Cohn, *supra* note 32, at 1255.

455. *Id.*

456. Cole, *supra* note 13, at 593.

